No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1998

SGT. CASEY, SGT. GREENE, TIMOTHY MUHALL, AND A. CONNORS, R.N. MEDICAL DEPT.,

Petitioners,

-v.-

DONOVAN BLISSETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: September 22, 1998

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QUESTION PRESENTED

Whether the Prison Litigation Reform Act limitations on attorney's fees available under 42 U.S.C. § 1988 apply in this action, where both the underlying trial and judgment and the ensuing fee proceeding took place after the Act was adopted.

LIST OF PARTIES

Petitioners are Sgt. Casey, Sgt. Greene, Timothy Mulhall and A. Connors, R.N. Medical Dept.

Respondent is Donovan Blissett.

Petitioners are Daniel Casey, Sergeant, deceased, by Lita D. Casey, as Executrix of the Estate, Timothy Mulhall, Ralph Green, Sergeant, and Anne Connors.

Respondent is Donovan Blissett.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1998

SGT. CASEY, SGT. GREENE, TIMOTHY MUHALL, AND A. CONNORS, R.N. MEDICAL DEPT.,

Petitioners,

-against-

DONOVAN BLISSETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS BELOW

The decision of the United States Court of Appeals for the Second Circuit is reported. *Blissett v. Casey*, 147 F.3d 218 (2d Cir. 1998) (A1). The Memorandum-Decision and Order of the United States District Court for the Northern District of New York, dated June 18, 1997, is also reported. 969 F. Supp. 118 (N.D.N.Y.) (A9).

JURISDICTIONAL STATEMENT

The decision and judgment of the United States Court of Appeals for the Second Circuit were entered on June 25, 1998. Jurisdiction exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1997e(d) provides as follows:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that --
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the

judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

42 U.S.C. § 1988(b) provides:

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318[20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title,, [stet.] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The Prison Litigation Reform Act (PLRA), Pub. L. 104-134, 110 Stat. 1321, became effective with the President's signature on April 26, 1996. *Crawford-El v. Britton*, ___ U.S. ___, 118 S.Ct. 1584, 1596 (1998). Section 803 of the Act added a new 42 U.S.C. § 1997e(d) placing certain limitations upon the attorney's fees recoverable in prisoner litigation under 42 U.S.C. § 1988. In particular, the new provision provided that a portion of the inmate's judgment (not to exceed 25%) should be applied to satisfy the fee award and that, if the award was not greater than 150% of the judgment, the defendant should pay the difference (§ 1997e[d][2]). It also limited the hourly rate to an amount no greater than 150% of the hourly rate established under section 18 U.S.C. § 3006A for payment of court appointed counsel (§ 1997e[d][3]). *See, 2 Schwartz Kirklin, Section 1983 Litigation: Statutory Attorney's Fees* § 1.2 (1997).

Respondent Donovan Blissett, a prisoner acting pro se, instituted the underlying action pursuant to 42 U.S.C. § 1983 by complaint filed November 17, 1982 in the United States District Court for the Western District of New York. Jurisdiction existed under 28 U.S.C. § 1331. The action was subsequently transferred to the United States District Court for the Northern District of New York.

The complaint alleged that the defendants (petitioners here), all employees of the New York Department of Correctional Services, violated the Eighth Amendment rights of the respondent by subjecting him to a beating and injecting him with a tranquilizer at the Great Meadow Correctional Facility on April 22, 1981. Following discovery and various motions, including a request for assignment of counsel, respondent filed a notice of readiness for trial and a renewed motion for appointment of counsel in October, 1991. Mr. Burns, the first of respondent's three lawyers in the proceedings below, was

appointed as pro bono counsel by order of the district court filed November 18, 1991. He engaged in substantial pre-trial discovery before he was permitted to withdraw by order filed February 5, 1996, because respondent, having received a monetary judgment of some $90,000 in *Blissett v. Coughlin*, 66 F.3d 531 (2d Cir. 1995), no longer qualified for pro bono representation.

In March, 1996, respondent retained the services of his second and third attorneys, Mr. Cohen and Ms. Smith. As the district court noted, "(t)he record is incomplete as to the exact date and circumstances surrounding (their) retention" (969 F. Supp. at 121). Mr. Cohen and Ms. Smith represented respondent at the trial, which was held on July 1-3 and 8, 1996. The result was a jury verdict for respondent in the amount of $85,500 in compensatory and punitive damages. In a decision dated September 18, 1996, the trial court granted petitioners' post-trial motion, and reduced the award to $22,978 in lieu, at respondent's option, of a new trial. Upon respondent's acceptance of the reduced amount, the judgment was entered for respondent in that amount on January 28, 1997.

Respondent moved for an award of attorney's fees pursuant to 42 U.S.C. § 1988 by motion dated February 13, 1997. In its memorandum-decision and order dated June 18, 1997 (A10-43), the district court made an award of $94,403.35, divided among the three attorneys, $40,749.75 for Mr. Burns, $19,515 for Mr. Cohen and $33,138.75 for Ms. Smith (A43; 969 F. Supp. at 135). The court held the PLRA inapplicable to Mr. Burns because he rendered his services prior to the effective date of the Act (A23-25; 969 F. Supp. at 126-127). The court also held the PLRA inapplicable to Mr. Cohen and Ms. Smith, notwithstanding a finding that approximately 85% of their services were rendered after the effective date of the Act. The court reasoned that imposition of the limitations in the new Act would be impermissibly retroactive and manifestly unjust

because the relevant event for retroactivity purposes is the date when Cohen and Smith agreed to represent respondent Blissett (A25-30; 969 F. Supp. at 127-129).

Petitioners appealed to the United States Court of Appeals for the Second Circuit. In affirming, the Second Circuit reasoned that "application of the limitations of the Act to representation begun before its passage could have a seriously detrimental retroactive effect on previously established rights and reasonable prior expectations. In the present case, where 100 percent of Attorney Burns's work and 15 percent of the work done by Attorneys Cohen and Smith were rendered before the passage of the Act, application of the PLRA would retroactively diminish the plaintiff's judgment by causing the application of a portion up to 25 percent to his attorneys' fees and would also retroactively diminish his attorneys' reasonable expectations of compensation in the event they prevailed" (A7-8; 147 F.3d at 221).

REASONS FOR GRANTING THE WRIT

The decision below, in holding that the attorney's fee provisions of the PLRA were not applicable, is in direct conflict with decisions of the Fourth and Ninth Circuits. Other circuits agree with the court below or have adopted differing criteria. In view of these conflicts and divergent views of how the PLRA should be applied consistent with the Court's leading decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and additionally because the issue is one of substantial importance given the large number of cases affected and the magnitude of the States' potential monetary liability, certiorari should be granted.

I.

THE CIRCUITS ARE IN MARKED DISAGREEMENT

The circuits are in marked disagreement over the fee limitations of the PLRA. In declining to apply the PLRA to the fee award at issue, the Second Circuit expressly declined (147 F.3d at 220) to follow the Fourth Circuit's decision in *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997), cert. denied, 118 S.Ct. 880(1998). *Boyd* held the fee limitations applicable to fee awards for services rendered before and after adoption of the PLRA in a class action involving the conditions of confinement of juveniles housed in state facilities. The court held that the plain language of section 1997e(d) mandates that all awards of attorney's fees after April 26, 1996 in any prison conditions lawsuit comply with the restrictions of the PLRA, regardless of when the legal services were provided. 113 F.3d at 1385-1386. The Fourth Circuit reasoned that, since the awards of fees at issue occurred after the date of the Act and § 803 did not contain an effective date, that section was controlling unless applying it would give the statute "retroactive effect." 113 F.3d at 1387. The court found no such effect "because the determination of attorney's fees awards, which are collateral to the main cause of action, does not attach new legal consequences to completed events. Moreover, the modifications made by § 803 of the PLRA * * * are not so fundamentally unfair as to result in manifest injustice." 113 F.3d at 1388. Although only injunctive relief was involved in the underlying action and therefore the additional cap imposed by 1997e(d)(2) was inapplicable, the court noted that the same analysis would control such cases. 113 F.3d at 1386, n9.

The Ninth Circuit agreed with *Boyd* in *Madrid v. Gomez*, 150 F.3d 1030, 1998 WL 351214 (9th Cir. July 2, 1998). *Madrid* was a class action resulting in a finding of constitutional

infirmities in the conditions of confinement at the Pelican Bay State Prison. Prior to the adoption of the PLRA, the district court directed that fees be awarded at the current market rate for work performed during the remedial phase. In October, 1996, over the State's objection, the district court awarded fees at market rates for work performed before the Act. In June, 1997, the district court again awarded fees at market rates for work performed after the Act. The Circuit reversed and remanded.

Initially, as in *Boyd*, the court held that the plain meaning of the statute was controlling; "the statute, by its terms, targets any post-enactment award. The text is simply not susceptible to another meaning." 1998 WL 351214 at 7-8. The court also held that, even were this express command not present, the fees awards in issue would not operate retrospectively within the meaning of *Landgraf*. Concluding that the relevant past event against which retroactive effects are to be measured was the attorney's agreement to take the case, the Circuit nevertheless found no impermissible retroactivity because the prisoners and their counsel could have had no settled expectations; they had "ephemeral hopes and nothing more * * * when one's hope is so distant, as it was in this case, being subject to a new law cannot violate any conception of 'fair notice' so as to trigger retroactivity concerns." 1998 WL 351214 at 10. This was so because (1) only prevailing parties are entitled to fees and they could not know they would prevail, (2) not even all prevailing parties are entitled to fees, (3) not all fee awards are based on market rates, and (4) neither the prisoners nor their lawyers could know that the State would continue to violate their constitutional rights throughout the litigation and even after the district court's findings, necessitating a prolonged, intensive remedial phase. *Id.*.

In *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996), and *Jensen v. Clark*, 94 F.3d 1191, 1202-3 (8th Cir. 1996), the Seventh and Eighth Circuits concluded on the contrary that it would be

manifestly unjust to apply the PLRA where the relevant judgment and attorneys' services were rendered prior to the Act. However, the Eighth Circuit sustained application of the PLRA to post-enactment work in *William v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997).

In *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998), the Sixth Circuit also rejected the view taken by the Fourth and Ninth Circuits. *Glover* held that application of the fee limitations provision to a pending fee application for work completed prior to enactment would be impermissibly retroactive under *Landgraf* because it would "attach[ ] significant new legal burdens to the completed work * * * [and impair] rights acquired under pre-existing law." 138 F.3d at 250. *Glover* also rejected the Fourth Circuit's view that the plain language of the statute evinces clear congressional intent that all post-enactment awards must comply with the Act. 138 F.3d at 249. In *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. 1998), petition for cert. filed, 67 U.S.L.W. 3149 (August 6, 1998), the Circuit extended its approach in *Glover*, holding that the PLRA does not apply in any case pending when the Act became law. The court reasoned that the statute could not be interpreted differently for pre-Act services and for post-Act services. 143 F.3d at 252.

The view taken by the Fourth and Ninth Circuits is correct. They properly found that the plain meaning of the statute renders it applicable to pending fee applications. There is no need to resort to judicial default rules under *Landgraf*, 511 U.S. at 280. *Landgraf* identified a number of situations in which a court "should apply the law in effect at the time it renders its decision." 511 U.S. at 273, quoting *Bradley v. School Board of Richmond*, 416 U.S. 696, 711 (1974). Among them were changes in procedural rules. 511 U.S. at 275; *see*, *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997). *Landgraf*

clearly placed provisions for attorney's fees in the procedural category. 511 U.S. at 277; *see*, 292 (Scalia, J., concurring). The Court below erred in failing to apply these "clear interpretive rules". *Finley v. United States*, 490 U.S. 545, 556 (1989); see *Eskridge & Frickey*, The Supreme Court, 1993 Term: Forward: Law As Equlibrium, 108 Harv. L. Rev. 27, 65-68 (1994).

Moreover, specification of the "relevant past event" (*Landgraf*, 511 U.S. at 270), the "key component of retroactivity analysis" (*Fisch, Retroactivity and Legal Change*, 110 Harv. L. Rev. 1055, 1072 [1997]), confirms the correctness of the Fourth and Ninth Circuit views of this issue. In this case, the most relevant past event was the judgment. That is so because section 1988 authorizes fees only for the "prevailing party... as part of the costs." Pursuant to this statute, a fee award is not "compensation for the injury giving rise to an action" but rather "merely seeks what is due <u>because</u> of the judgment." *White v. New Hampshire Dept. of Employ. Secur.*, 455 U.S. 445, 452 (1982) (emphasis added). Since fees are "part of the costs", their purpose is readily understood as reimbursement for a portion of the expenses incurred in securing the judgment. *Hutto v. Finney*, 437 U.S. 678, 695 & n. 24 (1978). Moreover, respondent's award of fees was inextricably tied to his status as a prevailing party, and that status did not arise until the judgment in his favor. *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam). Until the judgment in this case, nothing could possibly be said to be due under section 1988 and therefore nothing before the judgment can reasonably be viewed as the relevant event. Since the judgment came after the PLRA was adopted, applying it in this case cannot be retroactive.

Even assuming the relevant event was the undertaking of representation, which in this case occurred prior to the adoption of the PLRA, applying that statute would not have a retroactive

effect. Neither respondent nor his attorneys had anything solid at that point. Respondent clearly had fair notice from the statute that he had to prevail to recover fees, hardly a sure thing. *Burlington v. Dague*, 505 U.S. 557, 563, (1992) ("no claim has a 100% chance of success"). Respondent could not have had settled expectations with respect to the receipt of any fees, much less that he would receive a fee greatly disproportionate to his damage award, as opposed to a fee allowed by the PLRA of 150% of that award; indeed, totally independent of the PLRA, such a disproportionate fee would have been at most "rare" under § 1988. *Riverside v. Rivera*, 477 U.S. 561, 586n.3 (1986) (Powell, J., concurring); see 588-596 (Rehnquirst, J., dissenting). What is required under *Landgraf* is not "mere" reliance or "mere" expectations, but "reasonable reliance" and "settled expectations" (511 U.S. at 270), neither of which can be deemed to have been present when representation was undertaken here.

The circuits' sharp disagreement as to whether the PLRA attorney's fees limitations apply to awards made after the effective date of the PLRA where at least some of the legal services were rendered prior to the effective date, and the correctness of the view taken by the Fourth and Ninth Circuits, which requires reversal of the decision below, clearly warrant review by this Court.

II.

THE ISSUE IS ONE OF SUBSTANTIAL IMPORTANCE IN VIEW OF THE LARGE NUMBER OF CASES AFFECTED AND THE MAGNITUDE OF THE MONETARY LIABILITY AT ISSUE.

As the number of circuit decisions to date indicate, this is a recurring issue and will be for the significant future. That is so

because it is not unusual for prisoner civil rights actions to extend over many years. Clearly, as the case at bar illustrates, prisoner civil rights litigation, like other types of civil rights litigation, is often "protracted." *Riverside v. Rivera*, 477 U.S. at 584 (Powell, J., concurring). *See, U.S. Dept. Of Justice, Bureau of Justice Statistics, Challenging the Conditions of Prisons and Jails: A Report on Section 1983 Litigation,* pp. 33-35 (1995) (hereafter BJS Report) (average mean processing time for tried cases: 1132 days [assault by officer]; 975 days [due process]; 943 days [medical treatment].) For the foreseeable future, there will unquestionably continue to be a large number of cases begun before the PLRA which involve attorney's fee issues. Prisoners filed a very large number of civil rights cases in the years immediately preceding the adoption of the PLRA: 1991 - 26,248; 1992 - 30,556; 1993 - 33,933; 1994 - 39,065; 1995 - 41,679. 1995 Report of the Director, Judicial Business of the United States Courts p. 412. While the Justice Department found that only four percent of prisoners in such cases have counsel (BJS Report pp. 21-22), in light of the overall number of filings, that is a significant number (*e.g.* in 1995, 1667 cases). The percentage of cases having counsel was much higher (i.e. 18%) for cases extending beyond 713 days (about 10% of the total number). BJS Report pp. ii, 2, 28-29. There will clearly continue to be a relatively large number of cases involving attorneys and therefore fee questions.

The monetary stake of the States is substantial. "The potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits." *Evans v. Jeff D.*, 475 U.S. 717, 734-735 & n.24 (1986). As this case demonstrates, it is not unusual for fee awards to far outstrip the damages award. *See, Davis v. Locke*, 936 F.2d 1208, 1215 (11th Cir. 1991) (fee award of $61,643; $3500 in damages); *Butler v. Dowd*, 979 F.2d 661, 676 (8th Cir. 1992) (*en banc*) cert. denied, 508 U.S. 930 (1993) (fee award of $95,000; nominal damages). Like the

defendants in *Evans*, New York often views "the risk of an attorney's fees award as the most significant liability in the case." 475 U.S. at 735.

Here, the fee award greatly exceeded the damages recovery. Indeed, the fee award of $94,403 was more than four times the damages recovery of $22,978 and did not include the respondent's fees on appeal; he has sought an additional award of some $40,000. If the PLRA applies, respondent's fees will be capped at approximately $34,000, *i.e.*, 150% of the damages recovery, and he may in addition be liable for a portion up to 25% of his judgment. That represents a substantial saving to New York in this case alone of approximately $100,000.

That is not unusual. *See*, *Chatin v. State*, 1998 WL 293992 (S.D.N.Y. June 4, 1998) (application of the PLRA resulted in reduction of some $98,000). Even in the cases involving injunctive relief alone, where the primary cap on fees is an hourly rate limited to 150% of the rate established under 18 U.S.C. § 3006A, the savings will be remarkable. *See*, *Madrid v. Gomez*, 1998 WL 351214 at 11 (applying a maximum hourly rate of $112.50 rather than the market rates of $155 to $305 per hour). In this case, the district court found the market rate in the Northern District was $150 per hour. The PLRA limits the rate to $67.50 for out-of-court time and $97.50 for in-court time (150% of the maximum rates established in the Northern District under 18 U.S.C. § 3006A). *Clark v. Phillips*, 965 F. Supp. 331, 335 (N.D.N.Y. 1997). Given the large number of cases involved, the monetary stakes are substantial.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED.

Dated: Albany, New York
September 22, 1998

Respectfully submitted,

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Decision and Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1126 - August Term, 1997

(Argued: February 17, 1998 Decided: June 25, 1998)

Docket No. 97-2459

----------x

DONOVAN BLISSETT,

Plaintiff-Appellee,

v.

SGT. CASEY, SGT. GREENE, TIMOTHY MULHALL, and A. CONNORS, R.N. MEDICAL DEPT.,

Defendants-Appellants.

----------x

Before: McLAUGHLIN and LEVAL, Circuit Judges, and SAND, District Judge.*

Appeal from order of the United States District Court for the Northern District of New York (McCurn, Judge) awarding attorneys' fees under 42 U.S.C. § 1988, and holding that the attorneys' fees provisions of the Prisoner Litigation Reform Act, 42 U.S.C. § 1997e(d), do not apply to those fees.

Affirmed.

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* The Honorable Leonard B. Sand, United States District Judge for the Southern District of New York, sitting by designation.

Peter H. Schiff, Deputy Solicitor General, Peter G. Crary, Assistant Attorney General, Albany, N.Y., Of Counsel), for Defendants-Appellants.

STANLEY L. COHEN, New York, N.Y. (Claudia A. Smith, Kingston, N.Y., James J. Burns, Albany, N.Y., Of Counsel), for Plaintiff-Appellee.

LEVAL, Circuit Judge:

This appeal raises the question whether the attorneys' fee provisions of the Prisoner Litigation Reform Act ("PLRA" or "Act"), 42 U.S.C., § 1977e(d), must be applied to all awards of attorneys' fees under 42 U.S.C. §1998 in prisoner civil rights litigation made after the effective date of the Act. Plaintiff Donovan Blissett prevailed in an action under 42 U.S.C. § 1983 in the United States District Court for the Northern District of New York. The district court awarded him fees under § 1988 and rejected defendants' contention that the PLRA provided an obligatory limit on the fees because the award was entered subsequent to the effectiveness of the Act. We affirm.

BACKGROUND

Plaintiff, a New York State prisoner serving a sentence for murder in the second degree, brought a civil rights action under 42 U.S.C. § 1983 on February 28, 1983, against state corrections officers, alleging the officers violated his Eighth Amendment rights by assaulting him, subjecting him to racial slurs, and injecting him with a tranquilizer. Plaintiff filed his complaint without assistance of counsel. On November 5, 1991, the district court appointed James J. Burns, an attorney, to represent plaintiff *pro bono publico*. During the course of the representation, plaintiff acquired funds and thus became ineligible for *pro bono* representation. Burns moved to be relieved, and on January 31, 1996, the court granted the motion. In March 1996, plaintiff retained the services of attorneys Stanley L. Cohen and Claudia A. Smith.

On April 26, 1996, the President signed the PLRA into law.[1] This Act, as further described below, places substantial limitations on the awards of attorneys' fees to prisoner plaintiffs under 42 U.S.C. § 1988. At the time the Act became law, Burns had completed 100 percent of his work on plaintiff's behalf, and Cohen and Smith had completed approximately 15 percent of the time they would ultimately work for the plaintiff.

Cohen and Smith eventually presented their client's case at the trial, which occurred between July 1 and July 8, 1996. The jury found for plaintiff; it awarded $5,600 in compensatory damages and $79,981 in punitive damages. The district court remitted the punitive damage award to $22,978.

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[1] Because Congress did not expressly provide an effective date, the Act presumptively became effective on the date the President signed it into law. *See United States v. Ferryman*, 897 F.2d 584, 589 (1st Cir.) *cert. denied*, 498 U.S. 830, 111 S. Ct. 90 (1990); *Moates v. Barkley*, 927 F. Supp. 597, 598 (E.D.N.Y. 1996).

Plaintiff then moved for an order requiring defendants to pay plaintiff's attorneys' fees pursuant to § 1988. It is undisputed that plaintiff's application is inconsistent with the limitations prescribed by the PLRA. The defendants opposed the plaintiff's application, contending that the PLRA must be applied. The district court rejected the defendants' position and awarded $93,403.35 in fees, to be divided among attorneys Burns ($40,749.75), Cohen ($19,515.00), and Smith ($33,138.75).

See Blissett v. Casey, 969 F. Supp. 118, 134-35 (N.D.N.Y. 1997)

DISCUSSION

The attorneys' fees provisions of the PLRA, contained in 42 U.S.C. § 1997e (d),[2] impose substantial restrictions on awards

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[2] The relevant provisions are as follows:

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that–
>
> > A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and
> >
> > B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
> >
> > (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for court appointed counsel.

of fees under 42 U.S.C. § 1988[3] in favor of plaintiffs in prisoner civil rights litigation. For example, paragraph (2) requires that a portion of the judgment awarded to the prisoner plaintiff, not exceeding 25 percent, shall be applied to the payment of attorneys' fees awarded against the defendant. The excess is to be paid by the defendant "[i]f the award . . . is not greater than 150 percent of the judgment." 42 U.S.C. § 1977e (d) (2). Thus, while the pre-existing § 1988 provided for an award against the losing party of a reasonable attorneys' fee of the prevailing party, the Act requires that up to 25 percent of the plaintiff's judgment be used to pay the fee awarded against the defendant, and appears (in unclear language) to provide that the balance is not to be borne by the defendant to the extent it exceeds 150 percent of the judgment.

The Act is silent as to whether or how its limitations should be applied where plaintiff's attorneys performed work before the Act became effective but the award of fees occurred after the effective date. Four broad approaches might govern such cases. First, the PLRA could be applied to all awards of fees entered after the effective date of the Act. Defendants advocate this rule on appeal and ask us to vacate the award of fees simply because it was made after the effective date of the Act, but did not comply with it. The Fourth Circuit adopted this rule in *Alexander S. v. Boyd*, 113 F.3d 1373, 1377 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998) (holding that the PLRA attorneys' fees provisions apply to all awards made after the effective date of the Act, regardless when the work was performed). Second, the PLRA could be held not to apply if the plaintiff's attorneys

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Title 18, for court appointed counsel.
42 U.S.C. § 1997e(d).

[3] Section 1988 provides, *inter alia*, that "[i]n any action or proceeding to enforce [various specified civil rights provisions], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs." 42 U.S.C. § 1988 (b).

filed their appearance (or began the representation) before the enactment. *See Hadix v. Johnson*, 1998 WL 177343, *6 (6th Cir. Apr. 17, 1998). Third, the PLRA might be applied to post-enactment work but not to work done before its enactment. *See Williams v. Brimeyer*, 122 F.3d 1093, 1094 (8th Cir. 1997). Finally, the question could be left to the discretion of the district court in the individual case, to be decided on the basis of such factors as the extent of the services performed before enactment, and the extent of reliance by plaintiff and his attorneys on the pre-PLRA fee regime.

We reject the rigid rule advocated by the defendants. By retroactive application, this interpretation would produce serious injustice in numerous cases. We believe that, had Congress intended so unfair a result, upsetting legitimate expectations based on the pre-existing law, it would have explicitly so provided. Consider, for example, a case in which an attorney undertook to represent a plaintiff long before the passage of the PLRA in reliance on the expectation, if prevailing in the suit, of having a reasonable fee covered under § 1998. Assume that the injury to plaintiff involved a matter of significant constitutional importance but relatively small injury measured in dollars, such as an abridgement by prison authorities of a right of free speech or free exercise of religion. The attorney worked diligently on the case for years, winning a money judgment in plaintiff's favor in the district court and affirmance on appeal. The case was intensely contested on both sides, with the consequence that the hours required were considerable and the attorney's reasonable fee far exceeded 150 percent of the damages awarded to plaintiff. Assume then that the enactment of the PLRA occurred just before the court made its award of attorney's fees. The rule advocated by defendants would retroactively impair the plaintiff's right to full compensation for the violation of his constitutional rights by taking up to 25 percent of the damage award to cover the defendants' liability for plaintiff's legal fee under § 1998. It might also seriously harm the attorney, who labored for years in good faith expectation that a reasonable fee

would be paid by the defendant if the plaintiff prevailed, but whose fee recovery might now be capped at 150 percent of the damage award. *See Jensen v. Clarke*, 94 F. 3d 1191, 1202 (8th Cir. 1996) (noting that attorneys performed their services in "reasonable reliance" on the pre-PLRA law allowing for full recovery of fees).

It is clear, depending on the circumstances, that the application of the limitations of the Act to representation begun before its passage could have a seriously detrimental retroactive effect on previously established rights and reasonable prior expectations. In the present case, where 100 percent of Attorney Burn's work and 15 percent of the work done by Attorneys Cohen and Smith were rendered before the passage of the Act, application of the PLRA would retroactively diminish the plaintiff's judgment by causing the application of a portion up to 25 percent to his attorneys' fees, and would also retroactively diminish his attorneys' reasonable expectations of compensation in the event they prevailed. Absent a clear statement of congressional intent favoring such a result, we will follow the "traditional presumption" against retroactively *Landgraf v. U.S.I. Film Prods.*, 511 U.S. 244, 280, 114 S. Ct. 1483, 1505 (1994), and conclude that the Act does not necessarily apply to all awards of fees made after its effective date.

We therefore reject the sole contention advanced by the defendants as a basis for vacating the district court's fee award. The defendants did not contend either in the district court or on appeal that the trial judge abused his discretion in failing to impose the PLRA's restriction on the fee award. Accordingly we leave for another day whether the Act should be construed to apply only to representations undertaken after its passage, only to hours worked subsequent to enactment, or whether its application to representations that include actively both before and after the enactment of the PLRA should be left to the informed discretion of the district court. Under either approach, the judgment of the district court must be affirmed.

CONCLUSION

THE DISTRICT COURT'S AWARD OF § 1988 ATTORNEYS' FEES IS AFFIRMED.

Memorandum Decision and Order of the United States District Court for the Northern District of New York

UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DONOVAN BLISSETT,

Plaintiff,

-v- 83-CV-218

SGT. CASEY, SGT. GREENE,
TIMOTHY MULHALL, and
A. CONNORS, R.N. MEDICAL DEPT.,

Defendants.

APPEARANCES:

OF COUNSEL:

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NEAL P. McCURN, S.J.

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MEMORANDUM-DECISION AND ORDER

Introduction

Perhaps, with the resolution of this motion for fees by plaintiff Donovan Blissett's attorneys, this protracted litigation, spanning more than fourteen years, will finally come to an end.

Originally, plaintiff Blissett commenced this action *pro se.* Eventually, on November 5, 1991, the court appointed attorney James J. Burns as plaintiff's *pro bono* counsel. By order dated January 31, 1996, the court granted attorney Burns' motion to withdraw.[1] Thereafter, in March, 1996, plaintiff retained the services of attorneys Stanley L. Cohen and Claudia A. Smith. The record is incomplete as to the exact date and circumstances surrounding plaintiff's retention of attorneys Cohen and Smith. Evidently there was no retainer agreement between plaintiff and those two attorneys, however, because undoubtedly they contemplated that if plaintiff prevailed, they would be compensated in accordance with 42 U.S.C. § 1998.[2]

As their time records indicate, commencing in March, 1996, attorneys Cohen and Smith performed various legal services for plaintiff Blissett, including serving as counsel during the trial of this matter which was conducted between July 1, 1996 and July

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[1]The precipitating event for that motion was the fact that in October, 1995, plaintiff obtained a substantial monetary judgment in another lawsuit. Once attorney Burns became aware of plaintiff's changed financial status as a result of that judgment, and that plaintiff no longer qualified for *pro bono* representation, attorney Burns rightfully contacted the court. Docket Entry ("Doc.) #145, exh. D thereto. Pursuant to the court's instructions, attorney Burns then attempted to enter into a retainer agreement with plaintiff. *Id.* When plaintiff did not respond to attorney Burns' overtures as to that retainer agreement, Burns moved to withdraw as plaintiff's *pro bono* counsel, and the court granted that motion. Doc. #150.

[2]Among other things, that statute authorizes a court, in its discretion, to award attorney's fees to a party who prevails in an action brought pursuant to 42 U.S.C. § 1983. *See* 42 U.S.C. § 1983 (West Supp. 1993).

8, 1996. Eventually, through the practice of remittitur, plaintiff obtained a $22,978.00 judgment.

Background

Each of the three attorneys who have variously represented plaintiff Blissett during the course of this litigation are now seeking their fees, and in the case of attorney Cohen, also expenses. Attorney James Burns is seeking a total of $45,997.50 in fees. Pl. exh. A (Affidavit of James J. Burns (July 25, 1996) ("Burns Aff."), at 8, ¶23. Attorney Burns claims that that figure represents 340.7 hours[3] expended in this case multiplied by his regular hourly rate of $135.00.[4] including time expended making this motion for fees. *Id.* Seeking compensation at the rate of $250.00 per hour attorney Stanley Cohen requests fees totaling $38,500.00, plus $1,007.00 in expenses. Pl. exh. B (Affidavit of Stanley L. Cohen (Feb. 9, 1997) ("Cohen Aff."), at ¶ 4. Cohen's requested fee is based upon an hourly rate of $250.00, multiplied by 154 hours of legal work. Attorney Cohen is not seeking compensation, however, for 31. 50 hours of work performed by various law clerks, paralegals and medical experts employed by his firm. *Id.* at n.1. Nor is he seeking payment for the twenty-four hours he expended assisting in post-trial matters. *Id.* Plaintiff's third attorney, Claudia Smith, is seeking a total of $35,278.13 in fees. Pl. exh. C (Affidavit of Claudia A.

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[3]Attorney Burns is not billing for 4.2 hours expended by law clerks, or the 10.95 hours he expended preparing his motion to withdraw. Burns Aff., at 3, ¶ 10. Also, in exercising "substantial billing judgment," attorney Burns avers "[t]here were many hours that [he] never billed to the file[,]"such as time expended attending a conference on civil rights litigation in federal courts, and time expended on an aborted attempt to meet with plaintiff. *Id.* at 4, ¶ 11.

[4]Attorney Burns' calculations are not quite accurate, however. The product of 340.7 multiplied by $135.00 is $45,994.50, and not $45,997.50 as attorney Burns avers.

Smith (Feb. 13, 1997) ("Smith Aff."), at 5, ¶ 15. But her calculations also are not accurate. Attorney Smith is requesting $150.00 per hour for the 236.90 hours she billed for legal services rendered, which includes the 31. 50 hours she expended preparing this motion. *Id.* In addition, she is seeking $4,528.13 for 40.25 hours of travel time at the rate of $112.50 per hour, or seventy-five percent of her usual $150 hourly billing rate. *Id.* The total of the foregoing is $40,063.13, and not $35,278.13, as attorney Smith states.

In opposing this motion, the defendants first assert that it is not timely, and, on that basis alone, the court should decline to award any fees. Second, the defendants contend that although a fee award may be appropriate under 42 U.S.C. § 1988, any such award is limited by section 803(d) of the recently enacted Prisoner Litigation Reform Act of 1995 (the "PLRA" or the "Act"), 42 U.S.C. § 1997e(d) (West Supp. 1997).[5] If the court disagrees with the defendants, and finds that the PLRA is not applicable, the defendants next assert that a reasonable hourly rate here is $150.00. Finally, the defendants maintain that because the court denied plaintiff's motion for an interlocutory appeal, attorney Smith[6] is not entitled to recover fees for preparation of that motion because plaintiff did not prevail thereon. The court will address each of these opposition arguments in turn.

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[5]The PLRA was actually part of a larger piece of legislation, the Omnibus Consolidated Rescissions and Appropriations Act of 1996. *Leonard v. Lacy*, 88 F.3d 181, 182-83 (2d Cir. 1996).

[6]Although defendants do not identify attorney Smith as the attorney responsible for that unsuccessful motion, the record indicates that she expended a total of 3.50 hours in preparing that motion. Smith Aff., attachment thereto at 2. Attorneys Burns and Cohen did not work on that motion at all.

DISCUSSION

I. Timeliness

Judgment in this case was entered on January 28, 1997. Doc. #190. This attorneys' fee motion was filed with the court on February 21, 1997. Doc. #192 and #193. Relying upon Fed. R. Civ. P. 54(d)(2)(B), which provides, in relevant part, "[u]nless otherwise provided by statute or order of the court, [a] motion [for attorneys' fees] must be filed and served no later than 14 days after entry of judgment[,]" the defendants contend that because plaintiff's motion was not filed until twenty-one days after entry of the judgment, the court should deny it as untimely. Invoking Fed. R. Civ. P. 6(b)(2), plaintiff contends that the court should overlook the fact that he did not timely file this attorneys' fee motion because his failure to do so was the result of "excusable neglect." Attorney Smith elaborates that she "[i]nadvertently, . . . miscalculated the time that the motion was due and mailed it to the Court on February 13, 1997 for filing and to the Assistant Attorney General for service the same day." Affirmation of Claudia A. Smith (Mar. 12, 1997), at 1, ¶ 4.

Rule 6(b)(2) provides in relevant part that "[w]hen by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period[7] permit the act to be done where the failure to act was the result of *excusable neglect*[.]" Fed R. Civ. P. 6(b)(2) (emphasis and footnote added). Rule 6 does not define "excusable neglect." In *Pioneer Inv. Co. v. Brunswick Assocs. Ltd. Partnership,* 507 U.S. 380, 113 S.Ct. 1489 (1993), however, the Supreme Court

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[7]Despite the fact that plaintiff Blissett did not formally move for an extension of time under this Rule, the court is treating his Reply Memorandum and accompanying affirmation of attorney Smith, which both address the issue of the timeliness of this fee motion, as a "motion" requesting an extension under Rule 6(b)(2).

discussed at some length the concept of "excusable neglect." The *Pioneer* Court's discussion of excusable neglect was within the context of Bankruptcy Rule 9006(b), which permits bankruptcy courts to allow creditors to file claims after the imposed "bar date," or deadline for filing such claims. Nonetheless, that discussion of excusable neglect is instructive here because the *Pioneer* Court explicitly referred to Fed. R. Civ. P. 6(b), among other Rules, as also containing the phrase "excusable neglect." *Pioneer,* 507 U.S. at 391-93, 113 S.Ct. at 1496-97. Indeed, "[t]he [*Pioneer*] Court specifically observed that in Fed. R. Civ. P. 6(b), as in Bankruptcy Rule 9006(b) which it was construing, 'there is no indication that anything other than the commonly accepted meaning of [excusable neglect] was intended.' " *Pratt v. Philbrook,* 109 F.3d 18, 19 n.1 (1st Cir. 1997) (quoting *Pioneer,* 507 U.S. at 391, 113 S.Ct. at 1496). Moreover, "the language of Rule 9006(b) is almost identical to the language of Rule 6(b)." *44 Liquormart, Inc. v. State of R.I.,* 940 F.Supp. 437, 440 n. 2 (D.R.I. 1996). Thus, "[s]ince *Pioneer,* courts have concluded the *Pioneer* standard of 'excusable neglect' should apply to Fed. R. Civ. P. 6(b)." *Id.* (citations omitted). In following that trend, the First Circuit in *Pratt* astutely observed that "[b]y construing excusable neglect,' a phrase used through the Federal Civil, Criminal and Appellate Rules of Procedure, *Pioneer* must be understood to provide guidance *outside the bankruptcy context." Id.* (emphasis added) (footnotes omitted).

As the Supreme Court has acknowledged, " ' ' [e]xcusable neglect' under Rule 6(b) is a somewhat 'elastic concept' and is not limited strictly to omissions caused by circumstances beyond the control of movant.' ' " *LoSacco v. City of Middletown,* 71 F.3d 88, 93 (2d Cir. 1995) (quoting *Pioneer,* 507 U.S. at 392, 113 S.Ct. At 1496). "Rather,[excusable neglect] may emcompass delays 'caused by inadvertence, mistake, or carelessness,'. . ., at least when the delay was not long, there is no bad faith, there is no prejudice to the opposing party, and movant's excuse has some merit[.]" *Id.* (quoting *Pioneer,* 507 U.S. at 388, and 394-95, 113 S.Ct. at 1495 and

1498); *see also Natural Father and Natural Mother v. Tolbert*, 170 F.R.D. 107, 110 (S.D.N.Y. 1997) (internal citations and quotations omitted) ("Excusable neglect encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness[.]"). A determination of excusable neglect will not be overturned on appeal absent a showing of abuse of discretion. *LoSacco*, 71 F.3d at 93 (citing, *inter alia*, *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 895-98, 110 S.Ct. 3177, 3192-94 (1990)).

Applying the three factor test articulated by the *Pioneer* Court to the record presently before it persuades the court that plaintiff Blissett's failure to timely file this motion was the result of excusable neglect. As to the danger of prejudice to the opposing party (here, the defendants), this factor weighs in favor of a finding of excusable neglect. In arguing that this fee motion should be denied as untimely, defendants make absolutely no mention of potential prejudice. What is more, it is difficult to see how there could be any prejudice to the defendants because, by their own admission, they received this fee motion on February 18, 1997. Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Attorney's Fees ("Def. Memo.") at 2.[8] Therefore, in keeping with one of the purposes of the fourteen day filing requirement for attorney's fee motions, which "is to assure that the opposing party is informed of the [fee] claim before the time for appeal is lapsed[,]"[9] defendants still had ten days from the date of receipt of this motion in which to decide whether or not to file an appeal.

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[8]In violation of Local Rule 10.1(a), the pages of defendants' memorandum are not numbered. For ease of reference, the court has taken the liberty of numbering the same.

[9]Fed. R. Civ. P. 54, Advisory Committee Notes, 1993 Amendments.

With respect to the second *Pioneer* factor, "the length of the delay and its potential impact on the judicial proceedings,"[10] the court finds that the delay here—whether calculated as two days or ten[11]—is relatively insignificant and does not warrant a denial of plaintiff's motion for attorneys' fees. The final *Pioneer* factor—the reason for the delay in light of the movant's good faith efforts and whether the circumstances were within the movant's reasonable control—"is the pivotal determinant of 'excusable neglect." *Tolbert, supra,* 170 F.R.D. at 110 (internal quotations and citation omitted). Attorney Smith's miscalculation of the filing and service date for this fee motion is, in this court's opinion, an "omission caused by carelessness," and thus constitutes excusable neglect,[12] especially taking into account, as previously mentioned, the fact that the delay here was slight

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[10]*Pioneer,* 507 U.S. at 395, 113 S.Ct. at 1498.

[11]Given the judgment entry date of January 28, 1997, in accordance with Rule 54(b)(2)(B), plaintiff had fourteen days from that date in which to file and serve this fee motion, or until February 11, 1997. Evidently calculating from the February 13, 1997, mailing date, plaintiff claims that the delay here was a mere two days. That is correct if plaintiff ignores Rule 54(b)(2)(B)'s mandate that an attorney's fee motion "must be filed *and* served no later than 14 days after entry of judgment[.]" Fed. R. Civ. P. 54(b)(2)(B) (emphasis added). A strict interpretation of that fourteen day requirement would mean that plaintiff's fee motion was actually ten days late because it was not filed with the court until February 21, 1997.

[12]*See Fidelity Federal Sav. and Loan Ass'n v. Felicetti,* 148 F.R.D. 532, 533 (E.D.Pa. 1993) (court accepted untimely response to motion to compel where the delay was only one business day and "was the result of counsel's inadvertent miscalculation of the response date[ ]"); *Dugan v. Selco Industries, Inc.,* 96 C 8404, 1997 WL 116841, at *1 (N.D.Ill. Mar. 12, 1997) (denying plaintiffs' motion to strike as untimely an answer filed one day late due to counsel's "inadvertent mistake" in ascertaining the date of service for the summons); *but see 44 Liquormart, supra,* 940 F.Supp. at 440-42 (denying as untimely section 1988 motion for attorneys' fees even though the status of the case had changed from one in which attorneys' fees were not available to one in which they were, and even though the delay was attributable, in part, to personnel problems in attorney's office).

and that there was no prejudice to defendants. Nor is there any evidence in the record of bad faith on Ms. Smith's part; and, there is some, albeit not much, merit to plaintiff's excuse.

In finding excusable neglect, the court is fully cognizant of case law, which although not relied upon by the defendants herein,[13] arguably could support their assertion that this fee motion is untimely. For example, in *In re Cosmopolitan Aviation Corp.*, 736 F.2d 507 (2d Cir. 1995), the Second Circuit stated, "[t]he excusable neglect standard can never be met by a showing of inability or refusal to read and comprehend the plain language of the federal rules." *Id.* at 515. At first glance that unequivocal language, especially considering the Second Circuit's holding that the district court abused its discretion in granting an extension of time in which to file a notice of appeal seems to require this court to find that plaintiff Blissett has not shown excusable neglect. A careful reading *Cosmopolitan* reveals, though, that the party seeking the extension there had engaged in "truly remarkable bad faith. . .throughout th[at] litigation[,]. . . continually mischaracteriz[ing] facts, prior proceedings and the law." *Id.* at 509. Although the Second Circuit did not specifically cite that bad faith as a basis for reversing the district court's granting of an extension, such conduct undoubtedly influenced that determination.

Likewise, in *Allstate Ins. Co. v. Administratia Asigurarilor*, 163 F.R.D. 196 (S.D.N.Y. 1995), the court found no excusable neglect where counsel did not adhere to the twenty-day time limit for the filing of an answer. In so holding, the court reasoned, *inter alia*, that "[d]efense counsel's failure to understand the plain language of the Federal Rules of Civil Procedure does not constitute excusable neglect." *Id.* at 198 (citations omitted). Again, while initially it appears that attorney Smith stands in the same position as defense counsel in *Allstate*, in that

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[13]Not only did defendants fail to mention any of the cases discussed above, but they failed to provide any case law whatsoever to support their argument that this motion is untimely.

she failed to understand the plain language of Rule 54(d)(2)(B), close examination of *Allstate* indicates that "defense counsel's performance. . .[was] appalling." *Id.* at 199. Certainly that is *not* the case with attorney Smith's conduct.

Admittedly, the foregoing case law gives the court pause in assessing whether attorney Smith's inadvertent miscalculation is tantamount to excusable neglect. However, because the cases just discussed are factually distinguishable in terms of bad faith, a different result is warranted in this case where no bad faith is evident. Thus, after "taking account of all relevant circumstances surrounding [plaintiff's] omissions,"[14] and given the *Pioneer* Court's "forgiving attitude toward instances of 'excusable neglect[,]'"[15] in the exercise of its discretion, even though untimely, the court will consider the merits of the fee motion in this fourteen year old case.

II. Applicability of PLRA

"On April 26, 1996, the President signed the Omnibus Consolidated Rescissions and Appropriations Act of 1996,. . ., Title VIII of which is the Prison Litigation Reform Act of 1995 ["PLRA"]." *Leonard, supra*, 88 F.3d at 182-83 (citation omitted). That Act does not designate an effective date. *Duamutef v. O'Keefe*, 98 F.3d 22, 24 (2d Cir. 1996). Therefore, it is deemed to have become effective on the date the President signed it. *See Moates v. Barkley*, 927 F.Supp. 597, 598 (E.D.N.Y. 1996) (citation omitted).

Among other things, section 803 of the PLRA amended 42 U.S.C. § 1997e(d), placing certain limitations upon attorney's fees recoverable in prisoner ligation. In particular, 42 U.S.C. § 1997e(d) provides, in relevant part, as follows:

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[14] *Pioneer*, 507 U.S. at 395, 113 S.Ct. At 1498

[15] *Pratt, supra*, 109 F.3d at 22.

> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that-. . .
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for court-appointed counsel.

42 U.S.C. § 1997e(d) (West Supp. 1997). With absolutely no discussion, defendants assume that section 1997e(d) in its current form applies to the fee applications of the three attorneys who have represented plaintiff over the course of this litigation.[16]

Based upon section 1997e(d) of the PLRA, defendants are seeking to limit their potential liability for plaintiff's attorneys' fees in two ways. First, relying upon subsection three of that

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[16] As will be seen, defendants' failure to discuss the retroactivity issue is inexcusable given the existence of case law, albeit scant, addressing that issue. Indeed, although the court will not do so, defense counsel's failure to support his argument that this fee motion is governed by section 1997e(d), as well as his failure to cite any authority contradicting this argument, arguably could give rise to an award of Rule 11 sanctions. *See Allstate, supra*, 163 F.R.D. at 200 (ordering defense counsel to show cause why she should not be sanctioned under Rule 11 where she "fail[ed] to present th[e] Court with authority to support her argument. . ., [and] she neglected to cite any of the cases that contradict [her] argument[]").

statute, employing what they believe to be the appropriate hourly rate under 18 U.S.C. § 3006A (that is, sixty dollars per hour for in-court time and forty dollars per hour for out-of-court time),[17] defendants contend that plaintiff is only entitled to recover "approximately $46,569.00, not including plaintiff's portion of the costs."[18] Def. Memo. at 4.

The second way in which defendants are seeking to limit their potential liability for plaintiffs' attorneys' fees is through section 1997e(d)(2). In accordance with that subsection, defendants maintain that twenty-five percent of the $22,978.00 judgment, or $5,744.50, should be applied to satisfy any attorneys' fee which the court may award. Thus, by reducing the hourly rate sought in accordance with PLRA, and requiring the plaintiff, also in accordance with that Act, to contribute twenty-five percent of his judgment towards the fee award, defendants contend that they are liable to plaintiff for only $40,824.50 in attorneys' fees.

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[17] Assuming for the moment that plaintiff's attorneys should be compensated in accordance with section 1997e(d)(3), as this court just recently held, the rate of remuneration thereunder is $67.50 per hour for out-of-court time and ($97.50 per hour for in-court time, and *not* the lesser dollar amount which the defendants are suggesting. *See Clark v. Phillips*, 93-CV-338, 1997 WL 307207, at *3 (N.D.N.Y. June 2, 1997).

[18] There are two aspects of defendants' calculations which are puzzling. The first is their contention that the fees to which plaintiff's attorneys are entitled are "*approximately* $46,569.00[.]" Def. Memo. at 4 (emphasis added). Using simple arithmetic, defendants should be able to easily ascertain the exact amount of fees to which they believe plaintiff's attorneys are entitled. The second aspect of defendants' calculations which is puzzling is the discrepancy between the amount which, based upon the figures supplied by plaintiff's attorneys, the court calculates that those attorneys are seeking (a total of $120,782.63) and the amount defendants claim they are seeking - $119,772.63. The court arrived at the $120,782.63 figure by adding the $45,997.50 in fees which attorney Burns is seeking, *see* Burns Aff. at 8; the $39,507.00 in fees *and* expenses which attorney Cohen is seeking, *see* Cohen Aff. at ¶ 4; and the $35,278.13 in fees which attorney Smith is seeking, *see* Smith Aff. at 5.

Plaintiffs' attorneys strenuously object to the court imposing the PLRA's limitations on any fees awarded to them, but they do so for slightly different reasons. Attorney Burns responds that the PLRA should not be applied retroactively to reduce the amount of fees to which he would otherwise be entitled because his legal services were all rendered well before the Act's April 26, 1996, effective date. Despite the fact that the majority of the legal services rendered by attorneys Cohen and Smith were performed after the PLRA's effective date, they too maintain that the Act's cap on attorneys' fees should not apply to them. Attorneys Cohen and Smith argue that it would be "manifestly unjust" to limit their fees under the PLRA because, based upon their prior experience in civil rights cases, including section 1983 cases, when they were retained by plaintiff Blissett prior to the Act's effective date, they expected that if he prevailed, they would be compensated in accordance with 42 U.S.C. § 1988 and the case law construing that statute. They did not contemplate that any fee to which they might be entitled would be subject to the attorneys' fee limitations of the PLRA. Reply Memorandum of Law in Support of Plaintiff's Motion for Attorneys' Fees ("Reply") at 7.

First the court will examine whether the PLRA's attorney's fees limitation applies to attorney Burns. It will then go on to consider the applicability of that limitation to the fees sought by attorneys Cohen and Smith.

A. Attorney Burns

The Second Circuit has not yet addressed the issue of whether section 1997e(d) of the PLRA applies retroactively, although it has held that the Act's filing fee obligations apply retroactively. *Covino v. Reopel*, 89 F.3d 105, 107 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 1265 (1997). Two Circuit Courts have directly confronted this issue, however, and both have held that the PLRA's provision limiting attorney's fees in prisoner litigation does not apply retroactively. The Eighth Circuit in *Jensen v. Clarke*, 94 E.3d 1191 (8th Cir. 1996), declined to apply section 1997e(d) retroactively because the PLRA "was not in effect

when the plaintiffs' attorneys accepted th[eir] appointment. *Id.* at 1202. Nor was the Act in effect "when liability and fee determinations were made[.]" *Id.* Indeed, the PLRA still was not in effect when the Eight Circuit remanded *Jensen* to the district court in light of the Supreme Court's decision in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994). *Id.* Further, reasoned the *Jensen* Court

> the plaintiffs and their attorneys have proceeded from the outset under the assumption that Section 1988 would apply to this case.... It would be 'manifestly unjust' to upset those reasonable expectations and impose new guidelines at this late date.

Id. at 1203.

Besides not wanting to upset the reasonable expectations of plaintiffs and their attorneys, the *Jensen* Court relied upon a textual argument, reasoning that section 1997e(d) should not be applied retroactively because there was "evidence of congressional intent" to the contrary. *Id.* Namely, section 802 of the PLRA dealing with prospective relief expressly provides that it shall apply retroactively, whereas section 803, which amended section 1997e, is silent as to its retroactive application. *Id.* Thus, the Eight Circuit concluded that "[t]he exclusion of Section 803 and its fee provisions from that clear statement [of retroactivity in section 802] is inconsistent with the defendants' argument for retroactivity." *Id.*

Following the lead of the *Jensen* Court, the Seventh Circuit in *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996), likewise held that section 1997e(d) of the PLRA does not have retroactive effect. *Id.* at 921. "To give it [the Act] such effect would attach (without clear indication of congressional intent to do so) new legal consequences to completed conduct, namely the services rendered by the plaintiffs' counsel in advance of the passage of the new Act." *Id.* (citations omitted).

For nearly identical reasons, the court in *Weaver v. Clarke*, 933 F.Supp. 831 (D.Neb. 1996), a case upon which attorney Burns relies, reached the same result. The *Weaver* court held

that section 1973(d)(1)(A)[19] of the PLRA should not be applied retroactively in that case because "*all of the action* that triggered entitlement to an attorney's fees award took place prior to the date of enactment of the PLRA." *Id.* at 835 (emphasis added). In declining to apply that particular provision of the PLRA retroactively, the *Weaver* court further reasoned that "since Congress has not specified an effective date, retroactive imposition of the section of the PLRA upon which defendants rely would cause manifest injustice' to lawyers like Plaintiff's counsel who have performed their ethical obligations to the courts upon settled expectations premised upon precedent that if they 'prevailed' they would be compensated." *Id.* As these cases make abundantly clear, attorney Burns is not subject to the fee limitations of the PLRA because, with the exception of time expended on this fee application, which the court will later discuss, the legal services which he rendered were performed prior to the PLRA's April 26, 1996, effective date.[20] Consequently, in calculating attorney Burns' fee award, the court is not bound by the attorney's fee limitations found in section 1997e(d) of the PLRA.

B. Attorneys Cohen and Smith

Given the lack of case law directly on point, it is not so obvious, however, whether the PLRA's limitations on attorney's fees apply to the fees which attorneys Cohen and Smith are seeking. In the case law discussed above, the legal services were all rendered before the PLRA's effective date. Indeed, in *Jensen*, the fee determination had already been made once; it was only

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[19]That particular provision of the PLRA provides, among other things, that no fees shall be awarded unless "directly and reasonably incurred in proving an actual violation of plaintiff's rights...." 42 U.S.C. § 1997e(d)(1)(A) (West Supp. 1997).

[20]In fact, with the exception of time expended on this fee application, attorney Burn's last recorded work on this case was on December 7, 1995, approximately four and a half months before the PLRA became effective. *See* Burns Aff., exh. A thereto at 10.

an intervening change in case law that ultimately required the Court there to revisit the fee issue, and consider whether to apply the PLRA's attorney's fee provision retroactively. In the present case, however, as previously mentioned, the majority of the legal services rendered by attorneys Cohen and Smith were rendered after the passage of the PLRA.[21] Therefore, this court must decide whether application of the PLRA's attorney's fee provision would have an impermissible retroactive effect here, where the attorneys were retained *prior* to the passage of the Act, but performed roughly eighty-five percent of their legal services *after* the Act's passage.

As mentioned earlier, the PLRA has no effective date. Nor is there any mention in section 803(d) as to that section's retroactive application. The PLRA's legislative history is sparse; *Zehner v. Trigg*, 952 F.Supp. 1318, 1324 (S.D.Ind. 1997); and there is no legislative history regarding this particular provision of the Act, although clearly Congress' general purpose in passing the PLRA "was...to discourage the filing of frivolous suits and appeals by prisoners." *McGann v. Com'r, Social Sec. Admin.*, 96 F.3d 28, 31 (2d Cir. 1996). Given the absence of an effective date in the PLRA, as well as the absence of any guidance on the issue of retroactive application (either from the PLRA itself or from its legislative history), "the Second Circuit has used the standards set forth by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), to determine whether or not particular sections of the PLRA apply retroactively[,]" and so too will this

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[21] Attorneys Cohen and Smith estimate that prior to the Act's effective date they had completed approximately fifteen percent of the total legal services which they rendered on plaintiff's behalf. Reply at 7.

court. *See Harris v. Lord*, 957 F.Supp. 471, 474 (S.D.N.Y. 1997) (citing *Covino, supra*, 89 F.3d at 105).[22]

In *Landgraf*, the Supreme Court instructed that in deciding whether a newly enacted statute should be applied to pending cases, "the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." 511 U.S. at _____, 114 S.Ct. at 1505. Nothing in the PLRA's attorney's fee provision prescribes its reach. *Jensen*, 94 F.3d at 1202. Therefore, under *Landgraf*, "the court must determine whether the statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at _____, 114 S.Ct. at 1505. "If so, then the 'traditional presumption' against retroactivity precludes application 'absent congressional intent favoring such a result.'" *Jensen*, 94 F.3d at 1202 (quoting *Landgraf*, 511 U.S. at _____, 114 S.Ct. at 1505).[23]

Analysis of the present case under the standards articulated by the *Landgraf* Court convinces this court that the PLRA's attorney's fee limitations, 42 U.S.C. § 1997e(d), should not apply to legal services rendered by attorneys Cohen and Smith. To be sure, those attorneys did complete most of their work on this case after the PLRA's effective date. Contrary to what defendants implicitly suggest, however, in determining whether

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[22]*See also U.S. v. Certain Funds at Hong Kong, Shanghai Bank*, 96 F.3d 20, 24 (2d Cir. 1996), *cert. denied*, _____U.S. _____, 117 S.Ct. 954, 136 L.Ed.2d 84 (1997) (applying *Landgraf* criteria "[b]ecause neither the language of [the statute at issue] nor its legislative history provide any guidance as to whether it should apply to cases pending at the time of its passage[]").

[23]*See also Hughes Aircraft Company v. United States*, 95-1340, 1997 WL 321246, at *4 (U.S. June 16, 1997) (citing *Landgraf*, 511 U.S. at 268, 114 S.Ct. at 1498-1499) ("[W]e apply this time-honored presumption [against retroactive legislation] unless Congress has clearly manifested its intent to the contrary.").

to retroactively apply section 1997e(d) to this case, the court should not focus exclusively upon when the legal services were rendered. That focus is too narrow and fails to take into account the reasonable expectations of attorneys Cohen and Smith when they agreed to represent plaintiff Blissett. Similarly, focusing on whether the legal services were rendered before or after the enactment of the PLRA fails to take into account plaintiff Blissett's reasonable expectations when he retained attorneys Cohen and Smith and decided to persevere with this action. Instead, in the court's view, the relevant event for retroactivity purposes is the date when attorneys Cohen and Smith agreed to represent plaintiff Blissett.

When the court focuses on the circumstances under which attorneys Cohen and Smith agreed to represent plaintiff, it is persuaded that application of section 1997e(d) of the PRLA would "impose new duties with respect to transactions already completed[;]" and thus have an impermissible "retroactive effect". *See Landgraf*, 511 U.S. at 267 and 280, 114 S.Ct. at 1498 and 1505.[24] In particular, application of section 1997e(d) to the present case imposes an entirely new obligation on plaintiff Blissett which did not previously exist - payment of a percentage of his attorneys' fees out of the judgment rendered in his favor. Likewise, it takes away a right previously possessed by plaintiff - the right to be fully compensated, without a percentage reduction for attorneys' fees, for a violation of his constitutional rights. Moreover, when attorneys Cohen and Smith agreed to represent plaintiff Blissett, they had a reasonable expectation that if successful, they would be entitled to recover their fees in accordance with 42 U.S.C. § 1988,

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[24]*Cf. Harris v. Lord*, 957 F.Supp. 471, 474 (S.D.N.Y. 1997) (PLRA section denying inmate cause of action for mental or emotional injury without showing of physical injury did not apply retroactively because that section attached new legal consequences to events completed before the PLRA's enactment, and it denied the inmate a cause of action where she once had a "legally cognizable claim").

unencumbered by any later enacted legislation such as the PLRA. Attorneys Cohen and Smith structured their conduct (agreeing to represent plaintiff Blissett) on a right (to be compensated pursuant to the rates established under section 1988) which, although not abolished by the passage of the section 1997e(d), was limited by the passage of that statute. Therefore, even though attorneys Cohen and Smith rendered nearly all of the legal services after the PRLA's effective date, the court finds that factor is not dispositive of the whether their fees should be restricted by that Act's attorney's fee limitations. Instead, for the reasons just stated, the court finds that application of the [PLRA] in this [particular] case would have the effect of disappointing reasonable reliance on prior law[,]" thus 'leav[ing] [the court] with the 'traditional presumption' against retroactive application." *See Jensen*, 94 F.3d. at 1202. Consequently, in determining the fees to which attorneys Cohen and Smith are entitled, the court will look to section 1988 and the case law construing that statute.[25] It will not cap the requested fees in accordance with section 1997e(d)(3) of the PLRA; nor will it require that a portion of the attorneys' fees recovered herein be paid out of plaintiff Blissett's judgment, as section 1997e(d)(2) of that Act further directs.[26] In the court's

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[25]Likewise, the court will also apply section 1988 rates to the fees attorney Burns is requesting for preparing this fee motion, even though that legal work was performed after the PLRA's April 16, 1996, effective date.

[26]In *Hadix v. Johnson*, 947 F.Supp. 1113 (E.D.Mich. 1996), the court held that the PLRA's attorney's fee provision applies to legal services rendered after the effective date of the Act, although that same court had previously held that the Act's fee limitations did not apply to work performed before its enactment. *Id.* at 1114 and n.1. The defendants herein are not relying upon *Hadix* (or, as previously mentioned, upon any case law). Admittedly, though *Hadix* supports defendants' position that any fees for work performed by attorneys Cohen and Smith after April 26, 1996, should be limited by the PLRA's attorney's fee provision, and that plaintiff Blissett should be required to pay a portion of the fees out of his judgment. The court declines to follow *Hadix*, however, because, as discussed above, it believes that the proper

opinion, a contrary holding here would result in manifest injustice to attorneys Cohen and Smith. *See Bradley v. School Board of Richmond*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016 (1974) (court should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary").

III. Section 1988 Fees

Having determined that none of plaintiff's three attorneys are subject to the PLRA's cap on attorney's fees, the issue, as framed by the parties, becomes at what hourly rate should they be compensated. Before addressing that issue, the court will briefly review the legal principles which necessarily guide its determination of the fees to be awarded herein.

A. "Prevailing Party"

Given the jury verdict finding defendants Casey, Connors, Greene, and Mulhall liable for violating plaintiff Blissett's constitutional right to be free from cruel and unusual punishment, and the concomitant monetary award, including punitive damages, there is no dispute that he is a prevailing party within the meaning of 42 U.S.C. § 1988, and thus entitled to recover his reasonable attorney's fees thereunder. *See DeCarlo v. Perales*, 89-CV-383, 1997 WL 241080, at *2 (N.D.N.Y. May 2, 1997) ("The plaintiffs are clearly the prevailing parties as against Commissioner DuRose, not only attaining a judgment that he violated their constitutional rights, but also a monetary verdict in the sum of $300,000.").[27]

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focus in a case such as this is on what the parties (plaintiff and his attorneys) reasonably expected in terms of remuneration when they agreed to enter into an attorney/client relationship - not when the legal services were rendered.

[27]*See also Lilly v. County of Orange*, 910 F.Supp. 945, 949 (S.D.N.Y. 1996) (citation omitted) (plaintiff who was awarded damages on her section 1983 claim against one of the defendants was a prevailing party for purposes of recovering her attorney's fees under section 1988).

Defendants do not dispute that plaintiff was a prevailing party at trial, but they are contending that he was not a prevailing party with respect to the section 1292(b) motion for certification of an interlocutory appeal, which the court denied.[28] Thus, argue the defendants, plaintiff is not entitled to recover his attorney's fees for the time expended by attorney Smith in making that unsuccessful motion. The court disagrees. "The law is clear that '[u]nsuccessful legal efforts are compensable as long as they are not frivolous.'" *Berry v. N.Y. State Dept. of Correctional Services*, 947 F.Supp. 647, 652 (W.D.N.Y. 1996) (quoting *Big R. Food Warehouses v. Local 338 RWDSU*, 896 F.Supp. 292, 298 (E.D.N.Y. 1995)) (other citation omitted); *see also Seigal v. Merrick*, 619 F.2d 160, 165 (2d Cir. 1980) (reversing deduction from fee award for work on "unfruitful," but not frivolous claims). Even though plaintiff did not prevail on his interlocutory appeal motion, in the court's opinion, the argument advanced by plaintiff in that motion was not so untenable as to rise (or sink, as the case may be), to the level of a frivolous motion. Moreover, as the record demonstrates, clearly plaintiff Blissett prevailed on significant issues in this case. *See Ward v. Brown*, 899 F.Supp. 123, 126 (W.D.N.Y. 1995) (citation omitted) ("In light of plaintiff's victory on that major issue [reinstatement of his job], his failure to prevail on the lesser matter of [whether he verbally abused a patient] does not significantly detract from his overall success."). Consequently, attorney Smith's efforts in preparing the section 1292(b) motion

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[28]Under the practice of remittitur, finding the jury award of punitive damages against defendants Connors and Mulhall excessive, the court reduced that award. Rather than accepting the remitted damage award, plaintiff Blissett filed a motion seeking leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), claiming that there was "[a] substantial ground for difference of opinion" as to whether the punitive damage awards against those two defendants "shock[ed] the judicial conscience." Doc. 180 at 2, ¶2 (internal quotations and citations omitted). After determining that plaintiff had not met any of the three criteria justifying an interlocutory appeal under section 1292(b), the court denied plaintiff's motion. Doc. #182.

are compensable, despite defendants' protestations to the contrary.

B. Calculating the "Lodestar"

Having made the threshold determination that plaintiff is a prevailing party within the meaning of section 1988, the court will next consider the amount of attorneys' fees to be awarded. In arriving at a reasonable attorney's fee, district courts should begin by using the "lodestar" amount, which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *See Orchano v. Advanced Recovery, Inc.*, 107 F.2d 94, 98 (2d Cir. 1997) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983)). In determining whether hours were reasonably expended, courts should "exclude hours that '[w]ere excessive, redundant, or otherwise unnecessary' due to, for example, 'overstaff[ing][.]'". *Id.* (quoting *Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939-40). "Calculation of the lodestar also requires the court to determine the prevailing market rates for the type of services rendered,..., *i.e.*, the fees that would be charged for similar work by attorneys of like skill in the area[.]" *Id.* (internal quotations and citations omitted).

The difficulty arises, however, when, as here, "'lawyers come from out of town to litigate a suit.'" *Segarra v. Messina*, 158 F.R.D. 230, 234 (N.D.N.Y. 1994) (quoting *Donnell v. United States*, 682 F.2d 240, 251 (D.C.Cir. 1982)). In that situation, "[t]he 'lodestar' figure should be 'in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.'" *Luciano v. Olsten Corp.*, 109 F.3d 111, 115 (2d Cir. 1997) (quoting *Blum v. Stenson*, 465 U.S. 886, 896 n. 11, 104 S.Ct. 1541, 1547 n. 11 (1984)). The Second Circuit has instructed "that the 'prevailing community' the district court should consider to determine the 'lodestar' figure is 'the district in which the court sits.'" *Id.* (quoting *Polk v. New York State Dep't of Correctional Servs.*, 772 F.2d 23, 25 (2d Cir. 1983)). As the foregoing makes clear, the appropriate hourly rate to be applied

in calculating the fee awards in the present action is the prevailing rate in the Northern District of New York where this action was litigated, "irrespective of the fee usually charged by the attorney."[29] *See Segarra*, 158 F.R.D. at 234.

It is against this backdrop that the court will consider (1) the reasonableness of the hourly rates plaintiffs' attorneys are seeking; and (2) the reasonableness of the hours expended by plaintiffs' attorneys. In addressing those issues, the court is mindful of its obligation to make sufficient findings of fact to substantiate any fees awarded under section 1988. *See Orchano*, 107 F.3d at 97 and 99 (vacating and remanding case where district court failed to make adequate factual findings in calculating a fee award in a civil rights action). The court is also mindful of the Second Circuit's "warn[ing] that attorney's fees are to be awarded 'with an 'eye to moderation,' seeking to avoid either the reality or the appearance of awarding 'wind falls.' " *Evans v. State of Connecticut*, B-90-027, 1997 WL 264894, at *17 (D. Conn. May 12, 1997) (quoting *Baezer v. New York City Transit Authority*, 558 F.2d 97, 101 (2d Cir. 1997)) (other citations omitted).

1. Reasonable Hourly Rate

Defendants strongly urge the court to find "a reasonable fee based upon the prevailing rate in the Northern District of New York, which is $150 per hour." Def. Memo. at 5. As noted at the

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[29]There are exceptions to the rule that the rate of attorney compensation is governed by the market rates of the community in which the district court sits. *Segarra, supra*, 158 F.R.D. at 234-235 (internal quotations and citations omitted) ("(1) the need for special expertise of counsel from a distant district . . .,(2) when local counsel is unwilling to handle the case,..., and (3) when a lawyer files suit in his or her home district that is properly maintainable there, and the case is transferred to the forum district[]"). Attorney Cohen is not suggesting that any of those exceptions might apply here, and thus the court declines to consider the same.

outset, attorney Burns is seeking only $135.00 per hour[30] and attorney Smith is seeking $150.00 per hour. Because those rates easily fall within the prevailing rates for the Northern District of New York,[31] and because defendants do not object to the same, in calculating the fees due attorneys Burns and Smith, with the exception of travel time and non-legal tasks, which the court will separately address, the court will use the hourly rates which they are requesting. In accepting these requested hourly rates, the court has taken into account the legal experience and background of attorneys Burns and Smith, as more fully described in their respective supporting affidavits, as well as the complexity and nature of this case. Burns Aff., at ¶¶ 1-2; and Smith Aff., at ¶¶ 1 and 3.

The real controversy here centers on the $250.00 hourly rate which attorney Cohen, who, it appears, regularly practices in New York City, is seeking. In keeping with the prevailing rates in this District, and bearing in mind attorney Cohen's skill, experience and reputation as detailed in his supporting affidavit,[32] *vis-a-vis* other similarly situated attorneys in this community, the court finds that under the locality rule, he too

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[30]Attorney Burns candidly avers "that $135 per hours is eminently reasonable for an attorney with [his] training and experience in the Albany area." Burns Aff. at 6, ¶ 18.

[31]*See, e.g., Kahre-Richardes Found v. Baldwinsville*, 953 F.Supp. 39, 42 n.4 (N.D.N.Y. 1997) (citation omitted) ("In the Northern District of New York, reasonable hourly rates for legal work are $150...for partners and $100...for associates."), and *DeCarlo v. Perales*, 89-CV-383, 1997 WL 241080, at *2 (N.D.N.Y. May 2, 1997) ("reasonable rates are $150.00 per hour for partner efforts") (citing *Haley v. Pataki*, 901 F.Supp. 85, 89 (N.D.N.Y. 1995), *aff'd on other grounds*, 106 F.3d 478 (2d Cir. 1997)).

[32]*See* Cohen Aff. At ¶¶ 1-3.

will be compensated at the rate of $150.00 per hour,[33] except, as will be discussed, for travel time. The court is fully aware that this is a significant reduction from the hourly rate which attorney Cohen is seeking. However, under the locality rule," [h]igh-priced attorneys coming into a jurisdiction in which market rates are lower will have to accept those lower rates for litigation performed there." *Segarra, supra*, 158 F.R.D. at 234 (quoting *Donnell, supra*, 682 F.2d at 251). And that is precisely the situation in which attorney Cohen finds himself.

2. Hours Reasonably Expended

As *Hensley* makes clear, in calculating the lodestar figure, the court must next consider whether the hours expended by attorneys Burns, Cohen and Smith were reasonable. Except for the fees sought for preparation of the section 1292(b) motion seeking leave to file an interlocutory appeal, earlier discussed, the defendants do not challenge the reasonableness of the number of hours expended by plaintiffs' attorneys. Nevertheless, as the Second Circuit requires, the court has undertaken an independent examination of the contemporaneous time records[34] submitted by attorneys Burns, Cohen and Smith,

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[33] Although this litigation has spanned more than fourteen years, because the representation by plaintiff's various attorneys did *not* span that same number of years, the court is under no obligation "'to calculate and apply an average historic market rate for the period in question.'" *Contra Berry, supra*, 947 F.Supp. At 650 (quoting *Saulpaugh v. Montroe Community Hospital*, 4 F.3d 134, 146 (2d Cir. 1993)(because the case spanned the years 1989 through 1996, the court calculated and applied an "average historic market rate" for that period).

[34] As this court fully explained in *Cooley v. Arena*, 90-CV-603, 1996 WL 494983, 17 *3 (N.D.N.Y. Aug 29, 1996).

> The initial burden of documenting and proving entitlement to attorney's fees is on the party seeking such relief... Thus, central to an application for attorney's fees is the submission of time records reflecting the hours expended by counsel in pursuing the successful claims of their client.... The rule in this Circuit is that in order for a party to recover attorney's fees, such time records must be made contemporaneously with the associated work....

to insure that "'a certain number of hours were usefully and reasonable expended.'" *Haley, supra*, 106 F.3d at 484 (quoting *Lunday v. City of Albany*, 42 F.3d 131, 134 (2d Cir. 1994) *per curiam*)).

a. Attorney Burns

In reviewing attorney Burns' time records, the court finds that, in general, the hours expended by him were reasonable. The court is somewhat bothered though by the ten separate entries to "review file," when those reviews do not appear to be related to any specific task.[35] Furthermore, these appear to be

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> By the same token, however, it is not necessary for the applicant to submit the actual diary entries made by the attorneys at the time they perform the work... Rather, reconstruction of such contemporaneous records on a computer and billing based on these records is adequate....In the end, what is important is that these records...specify, for each attorney, the date, the hours expended, and the nature of the work done....

Id.(internal quotations and citations omitted). For the most part, the records of attorneys Burns, Cohen and Smith satisfy those standards, although it would have been preferable for attorney Cohen in particular to have provided more specificity. For example, he did not state the nature of the legal research which is purportedly conducted. *See Jackson v. Cassellas*, 959 F.Supp. 164, 167 (W.D.N.Y. 1997) (internal quotation and citation omitted) ("The Supreme Court has observed that counsel, of course, is not required to record in great detail how each minute of his time was expended[,] but at least counsel should identify the general subject matter of his time expenditures.") Therefore, although attorney Smith avers that she and attorney Cohen "carefully divided responsibility for different kinds of activities...so as to avoid any unnecessary duplication of effort[,] (and the court has no reason to question Ms. Smith's veracity), the court has no way of independently verifing whether the research efforts of attorneys Cohen and Smith were duplicative. *See* Smith Aff.at 3, ¶ 7.

[35]In contrast, there are numerous entries where attorney Burns reviewed the file in conjunction with, for example, drafting discovery demands or conducting legal research. *See, e.g.*, Burns Aff., exh. A thereto at 2 (entry for 9/9/92: "Review file; draft discovery demands"). In those instances, it is easier to see how the time expended reviewing the file was reasonable.

duplicative entries for review of the district court file.[36] Obviously some review of the file is necessary, particularly when an attorney first acquires a case. But, in the court's opinion, the time expended reviewing the file was excessive and thus attorney Burns is entitled to be compensated for only half of the time he billed for reviewing the file (8.45 hours, rather than 16.90 hours), particularly where the entries for such review are vague and do not provide the court with sufficient information to determine whether the hours expended on that particular task were reasonable. *See Jackson, supra*, 959 F.Supp. 168 (and cases cited therein).

There is one other area to which the court finds attorney Burns devoted an excessive number of hours, and that is for trial preparation. His time records contain eight separate entries for trial preparation (excluding entries for trial preparation done in conjunction with other tasks), totaling 35.5 hours.[37] Standing alone, that figures might not seem unreasonable. When viewed in the broader context of this litigation as a whole, however, the court finds that time somewhat excessive, especially considering the fact that ultimately attorney Burns did not represent plaintiff during the trial.[38] Accordingly, the court will reduce by one-third the hours (from 35.3 hours to 23.5 hours) for which attorney Burns will be compensated for trial preparation.

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[36]*See* Burns Aff. (2.20 hours on December 6, 1991; 1.10 hours on December 10, 1991; 2.0 hours on April 1, 1992; 2.70 hours on January 28, 1993; and .50 hours on February 11, 1993).

[37]Burns Aff., exh. A thereto (entries 6/15/95; 6/19/95; 6/20/95; 8/6/95; 8/19/95; 8/29/95; 9/6/95; and 9/13/95).

[38]The court is unwilling to allow three separate attorneys to be compensated for all of their trial preparation time, especially when, in the court's view, one lawyer could easily have handled the trial of this case on his or her own.

Furthermore, there are two tasks performed by attorney Burns for which the court declines to compensate him, and that is the work he did on plaintiff's clemency application,[39] and time spent reviewing the Western District of New York's manual for section 1983 prisoner cases.[40] It is not readily apparent that either of those tasks are relevant to this action. Therefore, because the court does not believe that the time was reasonably expended in connection with this action, attorney Burns will not be allowed to recover a fee for that 1.3 hours.

The remaining hours billed by attorney Burns were, in the court's opinion, reasonably expended. The court disagrees, though, that he should be compensated at the rate of $135.00 per hour for all of that time. Attorney Burns is not entitled to be compensated at the rate of $135.00 per hour for the .50 hours he expended to "request...clients [sic] file at District Court[,]"[41] nor for the .70 hours he expended "[o]btain[ing] copies of pleadings at District Court[,]"[42] because those are administrative tasks which just as easily could have been done by a non-lawyer. Thus, as to those tasks which the court deems non-legal, attorney Burns will be compensated at the rate of $50.00 per hour. *See Cooley, supra*, 1996 WL 494983, at *4 (and cases cited therein) ("[T]he case law is clear that an attorney is not entitled to be compensated at the same hourly rate for the performance of legal and non-legal services.").

Likewise, attorney Burns also is not entitled to be compensated at the rate of $135.00 per hour for his travel time. Mr. Burns did not always distinguish between time spent

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[39]*See* Burns Aff., exh. A thereto (.20 hours on 1/31/90 and .50 hours on 2/13/95).

[40]*Id.* (entry 9/3/92, .60 hours).

[41]*Id* (entry 3/30/92).

[42]*Id* (entry 4/3/92).

performing legal work and his travel time in relation thereto. For example, on April 10, 1992, he billed a total of 7.40 hours for the following: "Review file; research; attend conference with client at Fishkill Correctional Facility[.]" Burns Aff., exh. A thereto at 1. Therefore, the court has undertaken that task. Based upon an estimated travel time of two hours between Albany and Fishkill Correctional Facility (where the plaintiff was incarcerated at the time), and the same estimated travel time between Albany and Syracuse, attorney Burns expended twenty-four hours in travel time.[43] In accordance with the practice in this District, attorney Burns will not be compensated for his travel time at his full hourly rate for the performance of legal services, particularly where there has been no showing that he was able to render legal services *en route*. *See id.*, at *4 (and cases discussed therein). Although this court has previously awarded $50.00 per hour for travel time,[44] as Magistrate Judge Hurd recently did, the court will allow $65.00 per hour for that time. *DeCarlo, supra*, 1997 WL 241080, at *3.

To summarize, after taking into account the foregoing reductions and deductions, the court finds that attorney James Burns is entitled to a total of $40,749.75 in fees, which includes time expended on this fee motion. *See id.* (and cases cited therein). That figure represents 289.85 hours for legal work, at the rate of $135.00 per hour, or $39,129.75; plus 1.20 hours for non-legal work, at the rate of $50.00 per hour, or $60.00; and twenty-four hours of travel time at the rate of $65.00 per hour, or $1,560.00.

b. Attorney Cohen

As previously discussed, attorney Cohen will be paid at the hourly rate of $150.00, rather than the requested hourly rate of

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[43] *Id.*, exh. A thereto (entries 4/10/92; 11/4/92; 4/17/92; 4/30/92; 6/12/93; and 6/30/95).

[44] *Cooley, supra*, 1996 WL 494983, at *4 (and cases cited therein).

$250.00, except for travel time, for which he will be compensated at the rate of $65.00 per hour. In assessing whether he expended a reasonable number of hours on this litigation, the court finds that he has, except with respect to trial time. As noted earlier, there was no need for two attorneys to be present throughout the trial of this straightforward section 1983 action. Thus, attorney Cohen will be compensated for half of the time he spent in trial, or fifteen hours. Deducting that amount, as well as the twenty-two hours he billed for travel, the court finds that attorney Cohen is entitled to be compensated for 117 hours of legal work at the rate of $150.00, or $17,550.00. He is also entitled to compensation at the rate of $65.00 for his twenty-two hours of travel time, or $1,430.00.

In addition to his fees, attorney Cohen is also seeking "expenses" in the amount of $1,007.00. These costs include $603.00 for lodging for four nights; $120.00 for his food for four days; $80.00 for gas and tolls; and $204.00 for clothes for plaintiff Blissett. Cohen Aff., attachment thereto. No documentation has been provided to substantiate these expenses, and so the court will disallow a third of those expenses. *See Berry, supra,* 947 F.Supp. at 653. Moreover, as to the costs of plaintiff's clothes, the court finds that is not a "reasonable out-of-pocket expense[] incurred by the attorney and which [is] normally charged fee paying clients[,]"[45] and thus, attorney Cohen will not be reimbursed for that expenditure. Consequently, attorney Cohen is entitled to be compensated in the amount of $535.00 for his expenses. Thus, the total award (fees *and* expenses) to attorney Cohen is $19,515.00

C. Attorney Smith

In accordance with the hourly rates previously discussed, the court finds that attorney Smith is entitled to payment of

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[45]*See Cooley, supra,* 1996 WL 494983, at *6 (internal quotations and citations omitted).

$2,612.25 for the 40.25 hours of travel time which she billed.[46] For the reasons already discussed, the court will divide by one half the time expended by attorney Smith attending the trial of this action, as well as the time expended reviewing the file where the justification for such review is not readily apparent from her time records. This results in a reduction from thirty to fifteen hours of compensable trial time; and a reduction from eleven to 5.5 hours for compensable time expended reviewing the file. Attorney Smith's time is subject to one further reduction, and that is for time expended preparing for trial. Based upon her time records, attorney Smith expended thirty-four hours preparing for trial.[47] The court will reduce that figure by one-third, however, in keeping with its earlier observation that this is a trial which easily could have been conducted by one attorney.

Attorney Smith's time sheet also contains a couple of administrative tasks for which she will be compensated at the rate of $50.00.[48] Specifically, she is entitled to $50.00 per hour for the .25 hours expending transmitting a FAX to attorney Burns on July 19, 1996, and the 1.50 hours expended "[a]ssembling . . . pretrial memo/letter to Court[.]" Smith Aff., attachment thereto at 2. Attorney Smith is not entitled to payment, however, for the one hour she spent on January 13, 1997, preparing jury instructions,[49] because, in the court's opinion, that effort was duplicative in that jury instructions previously had been prepared by attorney Burns. Taking into

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[46]Given the usual hourly rate of $50.00 to $65.00 awarded in this District for travel time, the court will not award attorney Smith the higher requested hourly rate of $112.50.

[47]Smith Aff., (entries 6/7/96; 6/13/96; 6/17/96; 6/21/96; 6/23/96; 6/27/96; 6/28/96; 6/29/96; and 6/30/96).

[48]*See* discussion *supra* at 27-28.

[49]Smith Aff., attachment A thereto at 3.

account the foregoing, the court finds that attorney Smith is entitled to be compensated for 202.90 hours of legal work, which includes time expended on this fee motion, at the rate of $150.00 per hour, or $30,435.00. Additionally, she is entitled to be compensated for 40.25 hours of travel time at the hourly rate of $65.00, or $2,616.25, and at the hourly rate of $50.00 for the 1.75 hours she expended on administrative tasks. Accordingly, attorney Smith's total fee award is $33,138.75.

To conclude, the court grants plaintiff Donovan Blissett's motion for attorneys' fees in the total amount of $93,403.35 ($40,749.75 for the services of attorney Burns; $19,515.00 for the services of attorney Cohen; and $33,138.75 for the services of attorney Smith). The defendants are directed to promptly make payment in accordance herewith.

IT IS SO ORDERED.

DATED: June 18, 1997
Syracuse, NY

s/Neal P. McCurn
NEAL P. MCCURN
Senior U.S. District Judge

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
JUN 20 1997
AT _____ O'CLOCK _____
GEORGE A. RAY, CLERK
SYRACUSE

(2) 98-527
No.

FILED
OCT 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SGT. CAREY, SGT. GREENE, TIMOTHY MUHALL, and A. CONNORS, R.N. MEDICAL DEPT.,

Petitioners,

-v.-

DONOVAN BLISSETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: October 23, 1998

32 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the attorneys' fee provisions of the Prisoner Litigation Reform Act ("PLRA"), 42 U.S.C. § 1977e(d), must be applied to all awards of attorneys' fees under 42 U.S.C. §1998 in prisoner civil rights litigation made after the effective date of the Act.

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UNITED STATES SUPREME COURT

DONOVAN BLISSETT,

Plaintiff-Respondent,

-against-

SGT. CASEY, SGT. GREENE, TIMOTHY MUHALL, AND A. CONNORS, R.N. MEDICAL DEPT.,

Defendants-Petitioners.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT OF THE CASE

Plaintiff, Donovan Blissett, a prisoner, filed a *pro se* lawsuit on February 28, 1983, against defendants, corrections personnel, claiming that they violated his constitutional rights by physically assaulting him, subjecting him to racial slurs and injecting him with a tranquilizer without his consent. He brought an action under Title 42 U.S.C. Section 1983, claiming that prison personal at Great Meadows Correctional Facility had denied him his Eighth Amendment right to be free from "cruel and unusual punishment".

Mr. Blissett represented himself from the inception of the case until November 18, 1991, when Magistrate Daniel Scanlon, Jr., appointed James J. Burns, Esq., to represent him. In December, 1995, Mr. Burns made a motion to withdraw from the

case after plaintiff became ineligible for *pro bono* counsel. His motion was granted in January, 1996.

In March, 1996, Mr. Blissett asked Stanley L. Cohen Esq., to represent him at trial. At that stage in the litigation, it was necessary to attend several meetings with Mr. Blissett to discuss the case and to prepare him for his testimony. Mr. Cohen, therefore, asked Claudia A. Smith, Esq. to work with him on the case. Ms. Smith and Mr. Cohen divided the work necessary for trial.

The trial commenced on July 1, 1996 and continued to July 3, 1996, then resumed and concluded on July 8, 1996. The jury returned a verdict finding that defendants had violated plaintiff's Eight Amendment right to be free from cruel and unusual punishment and awarded plaintiff $5,600 for compensatory damages. After a separate hearing, the jury awarded plaintiff punitive damages in the amount of $79,981. The total damages awarded to plaintiff were $85,851. Judgment of the verdict was entered on July 8, 1996.

On July 18, 1996, defendants submitted a motion pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure, requesting judgment as a matter of law, or, in the alternative, a new trial. Plaintiff responded on August 23, 1996. On September 18, 1996, under the practice of remittitur, the court, by Memorandum-Decision and Order reduced the punitive damage award to $22,978. On January 27, 1997, the plaintiff accepted the remitted amount in lieu of new trial and on January 28, 1997, the court entered a judgment for the plaintiff in the remitted amount as stated above.

On February 21, 1997, plaintiff, as prevailing party, moved for an award of attorneys' fees pursuant to 42 U.S.C.

Section 1988. On March 10, 1997, defendants' filed their opposition to plaintiff's motion arguing *inter alia*, that the fee award should be governed by the limitations on attorneys' fees applications set forth in the PLRA. A reply Memorandum was submitted by plaintiff opposing that position.

On June 18, 1997, the lower court entered a Memorandum-Decision and Order regarding plaintiff's request for attorneys' fees. (A11-51) The court awarded total fees in the amount of $93, 403.35 to be divided among the three attorneys ($40,749.75 for the services of James J. Burns, $19,515 for the services of Stanley L. Cohen, and $33,138.75 for the services of Claudia A. Smith) (A41)

In so deciding, the court refused to apply the PLRA to any part of the attorneys' fees application stating that such application would have "impermissible retroactive effect" as to all the attorneys involved. The court examined the services performed by the attorneys. First, the court reviewed the work completed by Mr. Burns and held that the PLRA did not apply as the "legal services which he rendered were performed prior to the PLRA's April 26, 1996, effective date. (A24)

The court then analyzed the services performed by attorneys Cohen and Smith holding that they too were not subject to the limitations on attorneys fees provided under the PLRA. Although the court acknowledged that Congress' general purpose in passing the PLRA "was to discourage the filing of frivolous suits and appeals by prisoners" (A25) it stated that it "should not focus exclusively upon when the legal services were rendered, to do so would be too narrow and fail to take into account the reasonable expectations of attorneys Cohen and Smith." Instead, the court determined that the "relevant event is when Cohen and Smith agreed to represent plaintiff Blissett . . .

not when the services were rendered." It also found that application of the PLRA in this particular case would have the effect of disappointing reasonable reliance on prior law, thus "leav[ing] the court with the 'traditional presumption' against retroactive application." (A28).

Moreover, the court also examined the effect of the PLRA upon plaintiff Blissett's award and held that it should not be subject to the provisions of the PLRA. It reasoned that he had settled expectations that should not be disrupted by the PLRA's imposition of the payment of a percentage of his attorneys' fees out of the judgment rendered in his favor. The court stated that to do so would be to take "away a right previously possessed by plaintiff - the right to be fully compensated, without a percentage reduction for attorneys' fees, for a violation of his constitutional rights." (A28)[1]

In an appeal to the Second Circuit, petitioners argued for reversal of the District Court on the ground that the attorney fee provisions of the PLRA must be applied in all cases where the award of fees is made after the effective date of the Act. The Second Circuit rejected the rule advocated by petitioners as too rigid and held that under facts and circumstances of this case, "application of the limitations of the Act to representation begun before its passage could have a seriously detrimental retroactive effect on previously established rights and reasonable prior expectations." (A7). The Court of Appeals was careful to limit its decision to the facts of this case and expressly declined to announce a blanket rule, stating "we leave for another day

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1. After deciding the inapplicability of the PLRA to this case, the court adjusted the hours requested for payment by the attorneys pursuant to 42 U.S.C. Section 1988. The adjustments have not been challenged.

whether the Act should be construed to apply only to representations undertaken after its passage, only to hours worked subsequent to enactment, or whether its application to representations that include activity both before and after the enactment of the PLRA should be left to the informed discretion of the district court." (A7).

ARGUMENT

I.

THE LOWER COURTS CORRECTLY HELD THAT APPLYING THE PLRA IN THIS CASE WOULD HAVE AN IMPERMISSIBLE RETROACTIVE EFFECT

The lower courts correctly held that the limitations imposed by the attorneys' fees provisions of the PLRA should not apply in this case. The Second Circuit correctly rejected the rigid rule advocated by petitioners that the PLRA fee limitations must be applied to all awards made after the effective date of the Act. In so deciding, the court reasoned that to apply the PLRA to this case would fail to take into account the reasonable expectations of the attorneys when they agreed to represent the plaintiff and plaintiff's reasonable expectations when he initiated the action, retained the attorneys and decided to persevere with the action and elected to accept the remittitur rather than a new trial.

The court applied sound statutory interpretive analysis and concluded that Congress did not intend that the attorney fee provisions of the PLRA necessarily apply to all cases pending at the time of enactment. The court stated that application of the fee provisions to this case would constitute an impermissible

retroactive application of a statute under Landgraf v. USI Film Prods., 511 U.S. 244, 250-251 (1994).

A. The Lower Courts Held That Application of the PLRA to the Present Case Would Constitute a Retroactive and Inequitable Application of the Statute That Would Result in Manifest Injustice to Plaintiff and Plaintiff's Attorneys

The lower courts concluded that the attorney fee provisions of the PLRA must not be applied to this case because it would constitute an impermissible and unfair retroactive application of the statute. The courts correctly applied the standard set by the Supreme Court in Landgraf, *supra,* to determine whether or not section 803 of the PLRA should apply retroactively.

Pursuant to the teachings of Landgraf, when legislative intent regarding application of statutes to pending cases is ambiguous, courts must resort to the application of "judicial default rules." *Id.* at 257-263. These rules are guided by the presumption against retroactively applying laws to pending cases:

> [T]he presumption against retroactive legislative is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to confirm their conduct accordingly; settled expectations should not be lightly disrupted.

Id. at 265. (internal footnote omitted).

In determining whether to apply a newly enacted statute to pending cases, a court's first task is to determine whether application of the statutes would have a retroactive effect. *Id.* at 280. The Court described this process thus:

> [T]he court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change of law and the degree of connection between the operation of the new rule and a relevant past event...[F]amiliar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Id. 269-270. As further description of a retroactive effect, the Landgraf Court quoted favorably from Justice Story:

> [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retroactive.

Id. (quoting Society for Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (No. 13, 156) (CCDNH 1814) (emphasis added).

If the application of the statute would have a retroactive effect, the statute should not be applied to the case absent clear congressional direction. *Id.* at 280. In Hughes Aircraft Co. v.

U.S., 117 S. Ct. 1871 (1997), this Court stated that Justice Story's definition "does not purport to define the outer limit of impermissible retroactivity." *Id.* at 1876. Indeed, the Court in Hughes signaled that the circumstances in which a newly enacted statute will be applied to cases pending at the time of the statute's passage are extremely limited. *Id.* at 1878.

In Landgraf, the plaintiff alleged that she was the victim of sexual harassment from 1984 to 1986. At the time she filed suit in 1989, the relief authorized by Title VII was limited to backpay and injunctive relief. While the case was on appeal, Congress passed the Civil Rights Act of 1991, which added damages as an available remedy for certain kinds of discrimination. The plaintiff requested a remand for a jury trial on damages. *Id.* at 247-249. In Landgraf the Court declined to apply the statute to the case, finding that the application of the damages provision of the 1991 Act to pre-enactment conduct would have a retroactive effect because it would impose a new legal burden -- liability for damages -- on past conduct. *Id.* at 280-285. Similarly, in Hughes, the plaintiff's suit related to events that occurred between 1982 and 1984, at which time such suits were barred. After the relevant statute was amended to allow such actions, the plaintiff filed suit. The Supreme Court dismissed the suit, finding that applying the amendment to the case would give a retroactive effect to the statute. It would "impose new duties with respect to transactions already completed" by increasing the monetary liability for defendant's action; it would "attach a new disability, in respect to transactions or considerations already past" by eliminating a defense that the defendant had under prior law; and it would "create a new cause of action *Id.* at 1880.

The lower courts in this case correctly applied the process described in Landgraf, and followed in Hughes, when they

concluded that the PLRA's limitations on attorneys' fees should not apply despite the fact that, in the case of attorneys Cohen and Smith, the majority of the work had been completed after the passage of the Act. In so deciding, the district court stated:

> To be sure those attorneys did complete most of their work on this case after the PLRA's effective date. Contrary to what defendants implicitly suggest, however, in determining whether to retroactively apply section 1997e(d) to this case, the court should not focus exclusively upon when they agreed to represent plaintiff Blissett...When the court focuses on the circumstances under which attorneys Cohen and Smith agreed to represent plaintiff, it is persuaded that application of section 1997e(d) of the PLRA would "impose new duties with respect to transactions already completed; and thus have an impermissible "retroactive effect."

(A26-27) (citations omitted)

The district court further supported its reasoning by adopting rationales set forth in other circuit courts which had directly confronted the issue of retroactive application of this section of PLRA. In Jensen v. Clarke, 94 F. 3d 1191 (8th Cir. 1996) the Eighth Circuit declined to apply section 1997e(d) retroactively because the PLRA "was not in effect when the plaintiffs' attorneys accepted their appointment". *Id.* at 1202. The district court also noted the Seventh Circuit similarly held that 1997e(d) does not have retroactive effect. In Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996), the court stated that "[t]o give it [the Act] such effect would attach new legal consequences to completed conduct, namely the services rendered by the plaintiff's counsel in advance of the passage of the Act." *Id.*

On appeal the Second Circuit rejected petitioners assertion that the lower court erred in its application of Landgraf, and bound their reliance upon the Fourth Circuit's decision in Alexander S. v. Boyd, 113 F3d 1373 (4th Cir. 1997), cert. denied, 118 S. Ct. 880 (1998) to be entirely misplaced. In expressly rejecting the Fourth Circuit's conclusion that the PLRA's attorney fee provisions apply to all awards of attorney fees made after April 26, 1996, regardless of when the work was performed and, in disagreeing that the "plain language" of the statute required this result, the Second Circuit found that attorney fee awards were not necessarily "collateral" or "secondary" to the substantive rights of parties and accordingly elected to apply the retroactivity analysis. *Id.* at 1386-1388.[2]

The Second Circuit correctly rejected the Fourth Circuit's reasoning. The Boyd court misstates Landgraf when it claims that the Supreme Court "noted that application of a new statutes that affects only secondary, rather than primary, conduct does not give rise to concerns about retroactivity". *Id.* at 1387. Landgraf did not classify all attorneys' fees provisions as having no impermissible retroactive effect; rather, it acknowledged that the application of a recently enacted attorneys' fee provision in Bradley v. School Board of the City of Richmond, 416 U.S. 696, 722 (1974), would not generate a retroactive effect because the provision did not alter the existing rights of the parties. Landgraf, 511 U.S. at 277-278. In Bradley, attorneys' fees were awarded under the court's inherent equitable powers before enactment of a statute that created an additional basis of support for an award of fees. *Id.* Landgraf's endorsement of Bradley did not establish that attorneys' fees as a class, have no

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2. Since the Second Circuit's affirmance, the Ninth Circuit has agreed with Boyd, at least so far as fees for post enactment work are concerned. See Madrid v. Gomez, 150 F.3d 1030 (9th Cir. 1998).

"impermissible retroactive effect". Rather, the Court held that under the circumstances in Bradley, applying the statute retroactively would not result in a change in the parties' expectations or liabilities.

In Covino v. Reopel, 89 F.3d 105 (2d Cir. 1996), this Court recognized the point of clarification that Landgraf was making when it stated "[a] new attorney's fee provision may be applied to pending litigation" (citing Landgraf, 114 S. Ct. at 1503), at least in circumstances like those presented in Bradley v. Richmond School Board. *Id.* (emphasis supplied). Thus the Boyd court was flawed by inaccurately reading Landgraf as holding that all newly enacted attorneys fees statute are incapable of creating impermissible retroactive effect.

Boyd's determination that the clear language of the statute mandates that the PLRA be applied to all orders awarding attorneys' fees entered after the effective date the statute is similarly flawed. Boyd, 113 F.3d at 1386. As the dissent notes, the majority's reliance on its interpretation of the phrase "award of attorneys' fees" in section 1997e(d), is hardly sufficient "to establish that Congress clearly prescribed the reach of the statute". *Id.* at 1393 (Murnaghan, J. dissenting).

Moreover, petitioners' primary/secondary analysis fails to address subsection (2) of section 803 that states in pertinent part:

> Whenever a monetary judgment is awarded a portion of the judgment (not to exceed 25%) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150% of the judgment, the excess shall be paid by the

defendant.

This section, if applied, would require plaintiff Blissett, to pay his attorneys a portion of his judgment. Certainly petitioners cannot and do not attempt to argue that a reduction in plaintiff's judgment is either collateral or secondary to the rights of the plaintiff. Accordingly, even if one accepted petitioners' argument with respect to primary and secondary effects, application of the statute herein to Blissett would have the obvious and primary effect of reducing his judgment. Clearly this is the very type of retroactive effect circumscribed by the Court in Landgraf.

Indeed, both lower courts herein were concerned that application of the PLRA would effect settled expectations of the plaintiff and held that to apply the statute to the plaintiff would result in an impermissible retroactive effect. The district court stated:

> [A]pplication of section 1997e(d) to the present case imposes an entirely new obligation on plaintiff Blissett that did not previously exist -- payment of a percentage of his attorneys' fees out of the judgment rendered in his favor. Likewise, it takes away a right previously possessed by plaintiff - the right to be fully compensated, without a percentage reduction for attorneys' fees for a violation of his constitutional rights.
> (JA51-52)

Defendants' suggestion that neither plaintiff Blissett nor his attorneys possessed any substantive right to pre-PLRA compensation is similarly untenable. Plaintiff had settled expectations at the inception of his lawsuit that if he prevailed,

a jury would compensate him for his injuries and would pay his attorneys' fees. He was further apprised of his rights in a letter he received from Honorable Neal P. McCurn dated December 19, 1995. In that letter, Judge McCurn informed plaintiff that if he prevailed, the defendants would pay all costs and fees in his attorneys at reasonable hourly rates.[3]

As for attorneys Cohen and Smith, defendants contend that plaintiff's counsel could not reasonably expect to recover attorneys' fees after the adoption of the PLRA. Again, they are incorrect. They do not dispute the lack of legislative history concerning the attorneys' fee provision of the Act, yet they expect the plaintiff's counsel would assume that this provision would be applied retroactively to an on-going case, particularly where, as here, the changes in the law are neither minor nor procedural but, rather, involved material, substantive changes to existing rights under 42 U.S.C. Section 1988[4]

Defendants further contend that plaintiff's counsel did not have any reasonable expectation to any particular amount of fee award. They argue that since section 1988 gave the district court discretion with respect to the hourly rate and the hours to be

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3. Moreover, in October, 1992, Mr. Blissett prevailed at trial in another Section 1983 lawsuit commenced in the Western District of New York, See, Blissett v. Coughlin, 66 F.3d 531 (2d Cir. 1995). He was awarded $120,000.00 in damages (later reduced to $90,000 by agreement) and learned then that as a prevailing party he was also entitled to make an application to have the defendants pay the attorneys fees incurred pursuant to 42 U.S.C. Section 1988.

4. Defendants, without citation, label the attorneys' fees provision in section 803 of the PLRA, as "procedural in nature" like section 802 of the Act. This claim is completely unsupported and inconsistent with Congress' intent in amending Section 1988.

compensated, such discretion is to be applied with an "eye to moderation." What this argument fails to acknowledge, however, is that it has long been settled that a "reasonable" fee for purposes of section 1988 is a fee that is based on market rates for the services rendered. See Missouri v. Jenkins, 491 US 274 (1989); Loper v. New York City Police Dep't, 853 F.Supp 716, 719 (S.D.N.Y. 1994). Thus, imposing fees at this late date that are below the market rate would clearly frustrate counsels' settled expectations of obtaining a reasonable fee under section 988.

Notwithstanding petitioners' confused banter to the contrary, the lower courts correctly held that both the plaintiff and his attorneys did have settled expectations that if they prevailed in the section 1983 action that the plaintiff would receive a monetary judgment and that his attorneys' fees would be paid at the prevailing market rate. Application of section 803 of the PLRA would seriously upset these settled expectations and create an impermissible retroactive effect that would cause manifest injustice.

Moreover, petitioners' implication that the plaintiff's attorneys had no reasonable expectation to a fee in excess of the damage award is internally inconsistent. The Second Circuit aptly points out in its decision that there are certain rights, the vindication of which costs far more than what the victim is awarded in damages. (A6). Even petitioners' seem to suggest that this is not uncommon. "New York often views 'the risk of an attorney's fee award as the most significant liability in the case." (A13, quoting, Evans v. Jeff D., 475 U.S. 717 at 735 (1986)). It is hard to fathom why the expectations of plaintiff's attorneys to a fee at market rate, even if that fee exceeded the monetary damages awarded to plaintiff, would have been unreasonable if, as petitioner's say, such a fee "is not unusual." (A13).

B. The Lower Court Correctly Decided That Congress Intended for The PLRA's Attorney Fee Provisions to Apply only to Cases Filed After Passage of the Act.

In applying the traditional tools of statutory interpretation to the text at issue as well as to the language and design of the statute a a whole the Second Circuit correctly reasoned that Congress did not intend retroactive application of the PLRA fee limitations. K Mart Corp. v. Carier, Inc., 486 U.S. 281, 291 (1988); Alabama Power Co. v. United States E.P.A., 40 F. 3d 450, 454 (D.C. Cir. 1994); Lindh v. Murphy, 521 U.S. 320, 138 L.Ed. 481, 117 S.Ct. 2059 (1997).

The district court found that section 802 of the PLRA specifically speaks to a retroactive application whereas section 803 is silent. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Russello v. United States, 464 U.S. 16, 23 (1983). The ancient maxim of statutory interpretation must be applied unless there is clear evidence of a contrary legislative intent. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974); see also, Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993).

Section 803 is silent as to whether it should be applied retroactively to pending cases or only prospectively to cases filed after the Act's passage. Section 803 of the attorney fee provisions of PLRA state in relevant part:

> (d) Attorneys fees. (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that - -(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights. . .
>
> * * *
>
> (3) No award of attorney's fees in any action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, United States Code, for payment of court-appointed counsel.

42 U.S.C. Section 1997e.

In stark contrast, section 802 of the Act, which addresses "appropriate remedies" in prison conditions litigation, explicitly states that the section is to be applied to pending cases, as follows:

> Section 3626 of Title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief <u>whether such relief was originally granted or approved before, on, or after the date of the enactment of this title</u>.

Id. (emphasis supplied).

This district court concluded that given the inclusion of an explicit statement that section 802 applies to pending cases,

and the absence of a similar provision in section 803 addressing attorney fees, Congress clearly intended that the attorney fee provisions only apply to those cases filed after the enactment of the Act. In analyzing the PLRA the Eighth Circuit reached the same conclusion:

> [T]here is evidence on congressional intent contrary to retroactive application of [the attorney fees] portion of the Act. Section 802, the section of the Act dealing with prospective relief, specifically provides that it "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." Sec. 802(b)(1). Section 803, conversely, is silent on retroactive application. Congress saw fit to tell us which part of this Act was to be retroactively applied, Section 802. The exclusion of Section 803 and its fee provisions from that clear statement is inconsistent with the defendants' argument for retroactivity.

Jensen v. Clarke, 94 F. 3d 1191 at 1203 (8th Cir. 1996). Accord, Cooper v. Casey, 97 F.3d 913 (7th Cir. 1996); Weaver v. Clarke, 933 Fed. Supp. 831, 835 (D. Neb. 1996), aff'd, 120 F.3d 852 (8th Cir. 1997).

The explicit deletion of attorneys' fees from section 802 provides persuasive evidence that Congress intended prospective application of the attorneys' fees section. This conclusion finds substantial support in a recent Supreme Court decision, Lindh v. Murphy, 521 U.S. 390 (1997). In Lindh, the Supreme Court held that a certain provision of the "Antiterrorism and Effective Death Penalty Act of 1996" (AEDPA") is inapplicable to cases pending

when the Act was passed. The principal basis for the Court's decision was the AEDPA consists of two chapters, only one of which contains a provision (section 107(c)) specifying its applicability to pending cases, thereby creating the "negative implication that Congress intended for the provisions in the other chapter (which included the provision at issue in the case) to be inapplicable to pending cases". This negative implication arises because the two chapters had been joined together and introduced as a single bill, and were thus being simultaneously considered, at the time that section 107(c) was added (although they began life independently and in different Houses of Congress). The Court distinguished this legislative history from one in which "two chapters had evolved separately in the congressional process, only to be passed together at the last minute." *Id.*

Contrary to what defendants have argued, this reasoning can also be applied to the PLRA in examining its inception more closely. The precursor to the PLRA was the "Stop Turning Out Prisoners Act," known by the acronym "STOP", which was introduced as Title II of H.R. 667 in the House of Representatives and S. 400 in the Senate. In this version of the bill, the injunctive relief provisions and the attorney fee provisions of the PLRA appeared together in a single section that was subject to an explicit statement of its application to all cases then pending.[5] Thereafter, S. 400 was added by the Senate Appropriations Committee as Title VIII of the Commerce, State & Justice Appropriations bill ("CS&J bill"). During Senate floor debate on the CS&J bill, on September 29, 1995, STOP was

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5. The bill stated that all of its provisions were applicable to all relief, whether granted or approved before, on, or after the date of the enactment of this Act. See Sec. 2(b) in H.R. 667; Sec. 301(b) in S. 400.

replaced by a "Dole-Hatch substitute" bearing the moniker of the statute that ultimately became law. The vast majority of S. 400's provisions, including the retroactivity provisions, appeared in section 802 of the substitute bill. However, the attorney fee provisions had been extracted from this section and transferred to a new section of the bill, namely, section 803, which did not contain a retroactivity provision. The statute retained this structure until its final passage.

As described above, at the time that the PLRA's attorney fee provisions were transferred from a section that was subject to a retroactivity provision to one that was not, the two sections "had already been joined together and were being considered simultaneously" by Congress. These two sections did not "evolve separately in the congressional process, only to be passed together at the last minute." Thus, as in Lindh, a negative implication arises that the attorney fee provisions are inapplicable to cases pending when the Act was passed. Accord, Boria v. Keane, 90 F.3d 36 (2d Cir. 1996).

As the district court recognized, the presence of retroactive application in section 802 and the absence of it in section 803 only further supports the holding that the PLRA should not be applied to cases, such as this one, where the action was initiated and expectations settled before the passage of the Act.

II. THIS CASE DOES NOT PROVIDE THE APPROPRIATE VEHICLE FOR THE COURT TO RESOLVE THE DIFFERING INTERPRETATIONS GIVEN THE PLRA BY THE LOWER COURTS

This court does not sit to merely arbitrate differences of opinion in the Circuits. Were that the case the Court would have agreed to hear Alexander S. v. Boyd, *supra,* which stood in stark contrast to the approach taken by the Seventh and Eighth Circuit in Cooper v. Casey, *supra*, and Jensen v. Clark, *supra*, respectively. While recognizing the differences of approach taken by various circuit courts, there are other factors that militate strongly against the granting of *certiorari* in this case.

A. Petitioners' Attorneys Fees Argument Was An Unsupported Afterthought in the District Court.

Petitioners are seeking review in this Court of an issue they barely raised in the district court. Indeed, the district court came within a breadth of imposing Rule 11 sanctions on petitioners on the very point for which they now seek Supreme Court review.

In rejecting petitioners' arguments on the retroactive application of the PLRA fee limitation the district court opined:

> "With absolutely no discussion defendants assume that section 1997e(d) in its current form applies to the fee applications of the three attorneys who have represented plaintiff over the course of this litigation."

(A20)

Then in footnote 16 the court went on to chastise petitioners:

> "As will be seen, defendants' failure to discuss the retroactivity issue is inexcusable given the existence of case law, albeit scant, addressing that issue. Indeed, although the court will not do so, defense counsel's failure to support his argument that this fee motion is governed by section 1997e(d), as well as his failure to cite any authority contradicting this argument, arguably could give rise to an award of Rule 11 sanctions. See Allstate, supra, 163 F.R.D. at 200 (ordering defense counsel to show cause why she should not be sanctioned under Rule 11 where she "fail[ed] to present the Court with authority to support here argument...,[and] she neglected to cite any of the cases that contradict [her] argument").

Id.

By this point, plaintiff does not claim that the PLRA issue is unpreserved and thus beyond the jurisdiction of the Court. Although petitioners have barely preserved the issues raised in their petition they did so as an afterthought in the district court, without a single citation. This is hardly the commitment of zealous advocacy necessary and appropriate for arguments before the Supreme Court.

B. Petitioners' View of The Case Advanced Before the Second Circuit and In Their Petition To This Court Does Not Provide The Court with The Full Range of Argument or Options to Resolve the Issue Presented.

It cannot be argued that the Fourth and Ninth Circuits appear to be out of step with the other circuits that have addressed the retroactivity question posed in this case. It is important to identify what the Second Circuit actually held in this case. The Second Circuit did not hold that the fee limitations of the PLRA may never be imposed on fees earned pre enactment; nor did the court rule out an apportionment approach for time worked before and after enactment. The Court simply rejected petitioners' claim that, regardless of settled expectations and regardless of when the fee was earned, the PLRA fee limitations apply to all fees awarded post enactment.

Thus, given the narrowness of petitioners' analysis, this case only presents half the conflict between the circuits. Petitioners arguments make the retroactive application of the fee limitations an all or nothing proposition, whereas the Court in Landgraf mandated a more fact sensitive inquiry into the settled expectations of the affected attorney and her client. Indeed, there may well be no conflict between the Circuits on fees for post enactment work. Because of petitioners' argument, the Second Circuit was not afforded the opportunity to rule on this issue; neither will this Court, should it grant *certiorari*.

Moreover, although a conflict between the Circuits exists, it is not a conflict over the appropriate legal standard. The legal standard was established by the Court in Landgraf and refined in

Hughes -- there must be strong evidence of Congressional intent to apply a statute retroactively if to do so would disrupt settled expectations. The Fourth and Ninth Circuits have been satisfied that application of the fee limitations would not disrupt the settled expectations of the attorney and his client. In this case, the Second Circuit applied the same standard and concluded differently under all the facts and circumstances.

As noted, the Second Circuit rejected the notion that all post enactment fee awards must be subject to the fee limitations of the PLRA. The Court concluded that given petitioners' argument it was unable to decide more:

> We therefore reject the sole contention advanced by the defendants as a basis for vacating the district court's fee award. The defendants did not contend either in the district court or on appeal that the trial judge abused his discretion in failing to impose the PLRA's restriction on the fee award. Accordingly we leave for another day whether the Act should be construed to apply only to representations undertaken after its passage, only to hours worked subsequent to enactment, or whether its application to representations that include actively both before and after the enactment of the PLRA should be left to the informed discretion of the district court. (A7)

III. Expectations Are Now Settled in Most Circuits; Any Decision by This Court Will Unsettle Those Expectations and Lead to Further Litigation.

As noted, the linchpin of the retroactivity analysis pursuant to Landgraf is to define the reasonable and settled expectations of the attorney and her client. At this point, those expectations are settled in most circuits.

The fact that the rules differ between circuits is not as significant as the fact that the issue is settled in those circuits. Ironically, should this Court undertake to resolve the "conflict" between circuits, whichever way the court decides will disrupt the settled expectations of some and will stimulate even further litigation on this particular issue. Given the fact that as each day passes the numbers of pre enactment cases dwindles, it is sounder policy and more consistent with Landgraf to allow the settled expectations to remain so and to deny *Certiorari* in this case.

CONCLUSION

Whenever conflict exists between the circuits with respect to the retroactive application of the PLRA fee limitations is not fully presented by this case. *Certiorari* should be denied.

Dated: New York, New York
October 23, 1998

Respectfully submitted,

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FILED

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SUPREME COURT, U.S.

No. 98-527
In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

DANIEL CASEY, SGT., DECEASED, ETC., ET AL.,
Petitioners,

v.

DONOVAN BLISSETT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF *AMICI CURIAE* OF OHIO, ALABAMA, ARIZONA, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, THE COMMONWEALTHS OF MASSACHUSETTS AND PENNSYLVANIA AND THE TERRITORIES OF GUAM AND THE U.S. VIRGIN ISLANDS IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether the limitations on attorney fees established by the Prison Litigation Reform Act apply where both the underlying trial and the ensuing fee proceeding took place after the Act was adopted.

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STATEMENT OF *AMICI* INTEREST

The State of Ohio, together with 27 other *amici* States and Territories, support the efforts of the State of New York to seek review of the lower-court decision.

Operating prisons is one of the most vexing, and central, of State functions. The States' ability to perform that function became, and continues to be, hindered by a great number of institutional reform lawsuits that have resulted in hundreds of prisons and jails being placed under judicial supervision through consent decrees and similar arrangements. Although some of those cases initially served a wholesome function, they grew in number and scope, resulting in excessive judicial involvement in the day-to-day operations of such facilities. Recent studies indicate that more than 300 adult prisons are controlled by such arrangements. Criminal Justice Institute, Inc., *The Corrections Yearbook*, 54-55 (1997).

This development has had a number of deleterious consequences -- among other things, depriving administrators of the flexibility needed to perform their inherently difficult duties, undermining the effectiveness of line correctional staff, and adding great expense to an already costly aspect of State government. J. Marquat and B. Crouch, *Judicial Reform and Prisoner Control: The Impact of Ruiz v. Estelle on a Texas Penitentiary*, 55 Law & Society Review 557 (1985). Most vexingly, judicial management of state prisons often continues for years, as evidenced by the fact that some States are burdened by decrees entered more than a generation ago. *See Campbell v. McGruder*, Case No. 1462-71 (D.D.C. 1971) (decree pending for twenty-seven years); *Hines v. Anderson*, 439 F.Supp. 12 (D.Minn. 1977) (decree pending for twenty-one years).

Congress tried to address many of these problems through the Prison Litigation Reform Act, Pub. L. 104-134, 110 Stat. 321 ("PLRA"), which includes several measures designed to help States regain control of their prisons. One such measure is a provision that limits the attorney fees available in these cases. 42 U.S.C. § 1997e(d).

Prior to the PLRA, overly generous fee awards, particularly in the post-decree implementation phase, caused cases to become unduly wide in scope and long in duration. The PLRA limitations attempt to remove financial incentives to broaden and prolong such cases unnecessarily. 141 Cong. Rec. H1042 (daily ed. Feb. 1, 1995) (statement of Rep. Hoke); 141 Cong. Rec. H1480 (daily ed. Feb. 9, 1995)(Statement of Rep. Canady); 141 Cong. Rec. S14317 (daily ed. Sept. 29, 1995) (statement of Sen. Abraham).

In at least one respect, several lower courts have failed to give full effect to Congress's policy goals. The circuits are sharply divided over whether § 1997e(d) should apply to a large number of pre-enactment cases that continue to linger in the federal courts. This development has not only caused confusion in the thousands of individual cases described in New York's Petition, but will also dilute Congress's efforts to curb the 333 already-pending institutional reform cases. *The Corrections Yearbook*, 54. Only a decision by the Court can resolve these uncertainties and in the end ensure that the Congressional goals of the PLRA are uniformly fulfilled.

REASONS FOR GRANTING THE WRIT

This case merits review for three independent reasons: to resolve an acknowledged and deepening split between the circuits; to address the important federal questions raised in the case; and to correct a lower-court error.

I. THE CIRCUITS ARE IN CLEAR, ACKNOWLEDGED, AND DEEPENING CONFLICT.

Lindh v. Murphy, 117 S.Ct. 2059 (1997), and *Landgraf v. U.S.I. Film Products*, 511 U.S. 244 (1994), establish a three-step process for analyzing the applicability of a statute to a case pending on the date of its enactment. Clear inter-circuit conflicts have developed as to how § 1997e(d) fares under each of those steps, leaving lower courts and litigants in "gray zones of retroactivity analysis" because "courts have not reached any coherent consensus as to which cases § 1997e(d) should be applied." *Barnes v. Ramos*, 1998 WL 12035, Slip. Op. at * 1 (N.D. Ill. Mar. 13, 1998).

The circuits have reached conflicting results on the first step of the *Lindh/Landgraf* analysis -- whether the text of § 1997e(d) even has the potential to apply to cases pending on the date of enactment. The Ninth Circuit has expressly held that not only is it textually possible to apply § 1997e(d) to pre-enactment cases, but the text also requires such a result. *Madrid v. Gomez*, 150 F.3d 1030, 1035 (9th Cir. 1998). The Fourth Circuit has implicitly reached the same conclusion. *Alexander S. v. Boyd*, 113 F.3d 1373, 1385-1386 (4th Cir. 1997), *cert. denied*, 118 S.Ct. 880 (1998). The Sixth Circuit has reached an opposite conclusion. *Hadix v. Johnson*, 143 F.3d 246, 255 (6th Cir. 1998), *petition for cert. pending*, (No. 98-262). *Glover v. Johnson*, 138 F.3d 229, 249 (6th Cir. 1998), *petition for cert. pending*, (No. 98-262). Both sets of circuits have openly acknowledged the split. *Madrid*, 150 F.3d at 1035;

Hadix, 143 F.3d at 251-252; *Glover*, 138 F.3d at 249-250. *See also Blissett v. Casey*, 147 F.3d 218, 220 (2d Cir. 1998) (reproduced at Pet. A-5, A-6).

A conflict also exists regarding the second step of the *Lindh/Landgraf* analysis. This phase examines the statute to determine whether the legislature meant to apply the statute to pending cases. The Fourth and Ninth Circuits have held that § 1997e(d)'s direction that "no award" be made in "any" prisoner case shows that Congress meant the legislation to apply to pending cases. *Alexander S.*, 113 F.3d at 1385-1386; *Madrid*, 150 F.3d at 1035-1037. In contrast, courts in the Second, Third, Sixth, Seventh, and Eighth Circuits have held that no such direction exists. *Blissett*, 147 F.3d at 221 (reproduced at Pet. A-7); *Collins v. Algarin*, 1998 WL 10234 (E.D. Pa., Jan. 9, 1998) Slip. Op. at * 3; *Glover*, 138 F.3d at 249; *Hadix*, 143 F.3d at 251-252; *Cooper v. Casey*, 97 F.3d 914, 921 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191, 1202 (8th Cir. 1996). Once again, several courts have openly acknowledged the conflict. *Glover*, 138 F.3d at 249-250; *Hadix*, 143 F.3d at 251-252; *Madrid*, 150 F.3d at 1035.

The deepest and ripest inter-circuit conflict, however, exists on the third prong of the *Lindh/Landgraf* analysis, that is, whether the statute would have an improper retroactive effect. Courts in the Third, Fourth, and Ninth Circuits have found no such effect. *Collins*, 1998 W.L. 10234, Slip. Op. at ** 5,6; *Alexander S.*, 113 F.3d at 1387-1388; *Madrid*, 150 F.3d at 1038-1040. And the Sixth and Seventh Circuits have found such an effect. *Glover*, 138 F.3d at 250; *Cooper*, 97 F.3d at 921. Courts in the Second and Eighth Circuits have indicated that the question could be resolved in differing ways in cases with differing facts. Compare *Jensen*, 94 F.3d at 1202-1203 (retroactive as to fees for pre-enactment work) with *Williams v. Brimeyer*, 122 F.3d 1093 (8th Cir. 1997) (not retroactive as to fees for post-enactment work); *Blissett*, 147 F.3d at 221 (reproduced at Pet. A-7) (noting the potential for differing

results based on when the work giving rise to fees was done). *See also, Hadix*, 143 F.3d at 252 (rejecting the relevance of the date legal work was done) and *Madrid*, 150 F.3d at 1036 n. 9 (same). As is true of the other *Lindh/Landgraf* steps, the conflict here is openly acknowledged. *Glover*, 138 F.2d at 250 (noting inter-circuit conflict); *Collins*, 1998 WL 10234 at * 5; *Barnes*, 1998 W.L. 12035 at * 2.

In the end, the only material agreement among the lower courts is that they disagree over the applicability of the fee restrictions to pending cases. The *amici* States respectfully submit that this deep and growing conflict supplies an independent and adequate ground for granting the writ.

II. THIS CASE RAISES QUESTIONS OF GREAT IMPORTANCE TO THE STATES AND THE COURTS.

Even aside from the clear conflict presented, the case also presents important federal questions. The absence of clear direction from this Court will perpetuate uncertainty in States containing some of the nation's largest prison systems. The case also provides an opportunity to address an aspect of the *Lindh/Landgraf* analysis that has never been fully explained.

The mixed resolutions of the question presented creates great uncertainty for States, plaintiffs' counsel, and the courts in circuits containing some of the nation's largest prison systems. For example, the Second Circuit decision at issue here did not squarely delineate how to apply § 1997e(d); it merely ruled out one of several alternatives. Similarly, the issue has not been resolved in the First, Third, Fifth, Tenth, Eleventh and District of Columbia Circuits. Those circuits contain the States of New York, Pennsylvania, Texas, and Florida, among others, which operate some of the largest correctional systems in the

country. Courts and litigants in those States, and the 21 other States and territories in those circuits, have no clear answer to the issue at hand. This Court should provide that answer.

The case also merits this Court's attention because it provides an opportunity to answer an important but open question: What is needed to "expressly prescribe [a] statute's proper reach" under the second prong of the *Lindh/Landgraf* analysis? As noted in *Lindh*, that question was not reached in *Landgraf*, and it was also left unanswered in *Lindh*. *Lindh*, 117 S.Ct. at 2063. An answer to the question now will help avoid additional litigation over the issue -- litigation, incidentally, that needlessly exacerbates the very problems the PLRA was designed to curb.

III. THE SECOND CIRCUIT ERRED.

Review, lastly, is warranted because the decision below fails properly to apply two parts of the *Lindh/Landgraf* analysis. The most important part of the *Lindh/Landgraf* analysis is "to determine whether Congress has expressly prescribed the statute's proper reach," an approach consistent with this Court's precedents in related areas. *See Kansas v. Hendricks* 117 S.Ct. 2072, 2082 (1997) (noting the importance of textual analysis in the ex post facto context). A review of the Second Circuit's decision reveals that although it is long on decrying the potential unfairness of applying § 1997e(d) to pending cases, it is critically short in determining what Congress said on the topic. Indeed, it did not even devote a full paragraph to the matter.

Had the court engaged in the type of analysis required by *Lindh* and *Landgraf*, it would have found that Congress was quite explicit as to which cases it sought to control by § 1997e(d). The statute provides that "no" award shall be made in "any" case "brought" without complying with its terms. The use of such all-inclusive, unqualified terms as "no" and "any" indicates that Congress intended an all-inclusive and unqualified

application of the statute. *Lindh*, 117 S.Ct. at 2064, n.4. And use of the backward-looking verb "brought" indicates that Congress was not excluding cases commenced before it enacted § 1997e(d). *See United States v. Wilson*, 503 U.S. 329, 333 (1992); *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 57 (1987). However, the court below inexplicably ignored these linguistic cues.

The court also erred in its analysis under the second prong of *Landgraf*. Its decision is primarily, if not exclusively, based on the fact that some of the conduct drawn on by § 1997e(d) antedated the statute's enactment and that § 1997e(d) would likely upset counsel's expectations. However, *Landgraf* expressly held that such effects are not sufficient to preclude application of a statute. *Landgraf*, 511 U.S. at 269-270, n. 24. As recently recognized by the Ninth Circuit, counsel seeking fees under 42 U.S.C. § 1988 have no reasonable "settled" expectation of any specific fee award until they have both prevailed on the merits and satisfied the court that the fees they seek are reasonable, all of which happened in this case *after* enactment. *See Madrid*, 150 F.2d at 1038-1039. Hence, even if counsel's expectations were relevant, they were not retroactively dashed for purposes of *Landgraf* and the court below erred in giving them such significant weight. The lower court improperly ignored Congress's clearly expressed intentions and this Court's unequivocal teachings in *Landgraf*. Both errors support review.

CONCLUSION

For the foregoing reasons, the *amici* States respectfully urge the Court to grant the writ.

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IN THE

Supreme Court of the United States

October Term, 1998

DANIEL CASEY, SGT., Deceased, etc., *et al.*,

Petitioners,

-v.-

DONOVAN BLISSETT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF

The petitioners in the above-entitled case file this supplemental brief to advise the Court of a new decision pertinent to the petition.

In *Inmates of D.C. Jail v Jackson*, ___ F3d ___, 1998 WL 754391 (DC Cir Oct 30, 1998), the circuit, one judge dissenting, held the PLRA cap on attorney's fees applicable so as to limit the award of fees for legal services provided after the effective date of the PLRA. The case, begun in 1971, involved a constitutional challenge to the conditions at the D.C. jail. Injunctive relief was granted in 1975 and the plaintiffs' attorneys have been monitoring the injunction. In 1988, the district court

awarded the plaintiffs attorney's fees and fixed the hourly amount at market rates. Multiple payments were made to the plaintiffs' attorneys under that order. The issue addressed by the circuit was whether the fees for legal services provided after adoption of the PLRA were governed by the cap on hourly rates set by the PLRA. The court held they were, reasoning that "retroactivity concerns are not implicated when the statute is applied to work performed after passage of the PLRA." 1998 WL 754391 p 3. In so holding, the court noted its agreement with the Eighth Circuit's view of these matters (*Williams v Brimeyer*, 122 F3d 1093 [8th Cir 1997]), as well as its disagreement with the Sixth Circuit's view in *Hadix v Johnson*, 143 F3d 246 (6th Cir 1998), *pet for cert pending* (No. 98-262), that the PLRA did not apply to pending cases, and with the Fourth Circuit's view in *Alexander S. v Boyd*, 113 F3d 1373, 1386 (4th Cir 1997), *cert denied*, 118 S Ct 880 (1998), that the PLRA controls fees awarded after passage of the Act regardless of when the legal services were performed.

The decision demonstrates the clear, acknowledged and deepening conflict among the circuits and underscores the need for authoritative resolution by this Court.

Date Completed: November 4, 1998
Albany, New York

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